SUPREME COURT OF THE UNITED

No. 647.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BABCOCK AND LOUISA BABCOCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF

FILED APRIL 30, 1894.

(18,316.)

(18,516.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 317.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BABCOCK AND LOUISA BABCOCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the district court of the first judicial district, county of Box Elder	1	1
Complaint (No. 270)	1	1
Demurrer	4	2
Order overruling demurrer	5	3
Order granting leave to intervene	6	3
Answer	7	3
Reply	10	5
Answer of intervenor	11	5
Answer to cross-complaint of intervenor	15	8
Verdict	17	9
Judgment	18	9
Clerk's certificate to judgment	19	10
Complaint (No. 278)	20	11
Demurrer	22	12
Order overruling demurrer	23	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 11, 1903.

	Original.	Print
Answer	24	13
Order granting leave to intervene	26	14
Verdict	27	14
Judgment	28	15
Bill of exceptions	30	16
Order of consolidation	30	16
Objections to calling jury	31	16
Offers of evidence	31	17
Testimony of E. R. Chase	32	17
Plaintiff rests	32	17
Testimony of Mary Allen Dewey	33	18
Thomas Fryer	38	21
Milo V. Gardner	47	26
Clem Horsley	49	27
Defendant and intervenor rest	50	28
Motion for nonsuit on cross-complaint	51	28
Testimony of D. P. Tarpey	52	29
E. R. Chase (recalled)	64	36
Louisa Babcock	67	38
Defendants rest	79	46
Charge of the court	79	46
Plaintiff's exceptions	83	49
Plaintiff's Exhibit—Deed from Central Pacific R. R. Co. to Toltec Ranch Co., November 4, 1897.	84	50
Patent to Central Pacific R. R. Co., September 5, 1896	89	53
2—Articles of incorporation of Toltec Ranch Co	91	54
3—Agreement between Tarpey, Loveland, and Snow, December 18, 1889	93	56
A—Application of A. C. Loveland	96	58
B—Application of O. C. Loveland	97	59
Defendants' Exhibit 4—List of lands, &c.	98	59
5—Letter of Commissioner Wilson to register and receiver, May 15, 1869	102	61
Letter, register and receiver to Commissioner, May 24, 1869	103	62
Letter, Commissioner to register and receiver, October 16, 1873	105	62
7—Tax-sale certificate	106	63
8—List of lands	107	64
Diagram	111	67
Stipulation as to bill of exceptions	112	68
Notice of intention to move for new trial	113	68
Order denying motion for new trial	114	69
Order granting time to prepare bill of exceptions	115	69
Acceptance of service of proposed bill of exceptions	116	69
Judge's certificate to bill of exceptions	116	70
Notice of appeal	117	70
Clerk's certificate	118	70
Petition in error	119	71

	Original.	Print
Submission	123	74
Judgment	123	74
Opinion	124	74
Petition for writ of error	125c	80
Order allowing writ of error	125e	81
Writ of error	126	81
Citation and service	128	82
Assignment of errors	129	83
Bond on writ of error	131	84
Clerk's certificate	133	85

a In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, Appellant,
vs.
WILLIAM BABCOCK, Defendant, and LOUISA BABCOCK, Intervener, Respondents.

Nos. 270 and 278. Filed in supreme court of the State of Utah, Aug. 20, 1901. L. P. Palmer, clerk, by H. W. Griffith, deputy clerk.

1 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant. } Complaint.

The plaintiff above named complains and alleges:

That it is and was at all the times hereinafter alleged, a corporation organized and existing under and by virtue of the laws of the State of California.

1. That on the 4th day of November, 1897, the plaintiff was seized in fee of the following-described tract of land, situate in the county of Box Elder, State of Utah, to wit: 64 acres of land in sec. 17, township 11, north range 2, west, more particularly described as a strip 32 rods in width and 80 rods in length along the north side of the southwest quarter of the northeast quarter, and along the north side of the southeast quarter of the northwest quarter of said section.

More specifically described as follows: Beginning at the northeast corner of the southwest quarter of the northeast quarter of said section 17, running thence south 64 rods more or less, to a wire fence; thence west 160 rods more or less to the west line of the southeast quarter of the northwest quarter of said section 17; thence north 64 rods to the northwest corner of the southeast quarter of the northeast quarter; thence east 160 rods to the place of beginning, except the right of way of the Oregon Short Line railroad across the lands hereinbefore described, 100 feet wide.

2. That while the plaintiff was so seized, the defendant afterward to wit: on the said 4th day of November, A. D. 1897, entered into the possession of the south half of the said described 64 acres,
2 and unlawfully withholds the possession thereof from the plaintiff, to the plaintiff's damage in the sum of one thousand dollars.

3. And for a second and further cause of complaint, the Toltec Ranch Company, a corporation, alleges, that while being the owner in fee and in the possession and entitled to the possession of the north half of the above-described tract of 64 acres, to wit, on the — day of January, 1899, the defendant did enter into the possession of

the same, and has ever since and now does unlawfully withhold possession thereof from the plaintiff, to the damage of the plaintiff in the sum of one thousand dollars.

Wherefore plaintiff brings this suit, and demands judgment against the defendant.

First. For the recovery of the demanded premises.

Second. For the sum of one thousand dollars, the value of the rents, issues and profits, and costs of suit.

CHASE AND CHASE,
Att'ys for Plaintiff.

3 STATE OF UTAH, }
Box Elder County, } ss:

Edward R. Chase, being duly sworn, says: I am the agent of the plaintiff corporation in this action; I have read the foregoing complaint in said action and know the contents thereof, and the same is true of my own knowledge except as to the matters as are stated on information and belief, and as to those matters I believe it to be true.

EDWARD R. CHASE.

Sworn and subscribed before me this 30th day of September, 1899.

G. R. CHASE,
[NOTARIAL SEAL.] *Notary Public.*

4 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant. } Demurrer.

Now comes the defendant, William Babcock, and demurs to plaintiff's complaint on file herein, and for demurrer alleges:

1. That the plaintiff has no legal capacity to sue.
2. That the complaint does not state facts sufficient to constitute a cause of action.
3. That the complaint is ambiguous and unintelligible and uncertain in that it does not state the manner in which plaintiff was damaged.

B. H. JONES,
Attorney for Defendant.

Dated August 24, A. D. 1899.

5 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
v.
WILLIAM BABCOCK, Defendant.
} Order Overruling Demurrer.

This cause coming on to be heard on the demurrer of the defendant herein to the complaint of the plaintiff herein, and the same having been argued by counsel, and the court being fully advised in the premises, it is ordered that the said demurrer be overruled, and the said defendant given ten days in which to answer.

CHARLES H. HART, *Judge.*

Entered on the minutes of the court.
Dated Nov. 8, 1899.

6 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant.
} Order.

Good cause appearing therefor, it is hereby ordered that Louisa Babcock be permitted to file complaint in intervention and answer herein.

CHARLES H. HART, *Judge.*

Entered on the minutes of the court.
Dated Nov. 8, 1899.

7 In the District Court of the State of Utah in and for the County of Box Elder *County.*

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant.
} Answer.

The defendant above named, for answer to the complaint of the plaintiff herein, denies each and every allegation in the said complaint contained.

This defendant further alleges, that he holds the said property as agent of his wife, Louise Babcock, and that he, and his wife are over the age of 21 years; that he is the head of a family, and a qualified and competent pre-emptor and homesteader, and that his said wife and her predecessors in interest settled upon the land in queston on or about the — day of —— 1867, and ever since occupied, cultivated and improved the same, in compliance with the laws of the United States applicable to the disposal of public lands to settlers; in order to mature title to themselves that she has made lasting and valuable

improvements on said lands, such as a house, stable, stock yards, corrals, digged wells, planted gardens, and built roads, and has broken, cleared and cultivated a large portion of said lands; that her improvements are reasonably worth and have permanently enhanced the value of the said lands to the extent of $1500.

8 This defendant further alleges that the said lands were at all times mentioned public land of the United States that at the time the grant to the Central Pacific Railroad Company took effect the said land was cultivated, improved and occupied appropriated, interdicted, reserved and excepted land, and was not of the character contemplated by the grant to the said railroad company, under whom the plaintiff pretends to claim title.

Defendant further answering and for a defense alleges: That he, and his wife, Louise Babcock and those under whom she purchased and through whom she claims and their vendors have been in the actual peaceable, exclusive and quiet possession of said lands and premises and hold the same and every part thereof with all the improvements thereon openly, notoriously and adversely to said plaintiff and to all the world, except the United States, for more than 32 years last past and prior to the commencement of this suit, and said cause of action is barred by the statute of limitations as provided by sections 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2869, 2870, 2871, 2872, pages 634–'5, '6 of the Revised Statutes of Utah, title 73, ch. 3, and defendant here specially pleads and relies on the statute of limitations as a complete defense to this suit; and having fully answered all the allegations of the complaint, the defendant prays to be hence dismissed, with her costs, and should the defendant prove a better title to the property, then and in that event this defendant, in behalf of himself and his wife, Louise Babcock, asks judgment for the full value of all lasting improvements made upon the land by this defendant, himself and Louise Babcock, and by those under whom they claim in accordance with sections 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028 of an act concerning and occupying claimants, Revised Statutes of Utah of 1898, ch. 7, page 473.

B. H. JONES,
Attorney for Defendant.

8½ STATE OF UTAH,
County of Box Elder, } ss:

B. H. Jones, being first duly sworn deposes and says, that he is the attorney for defendant in the above-entitled action, and that he has heard read the foregoing answer and knows the contents thereof, and that the said — is true of his own knowledge except as to the matters and things stated on information and belief, and that he believes it to be true. This affidavit is made on behalf of defendant for the reason that he is absent from this county being in the southern part of the State.

B. H. JONES.

Subscribed and sworn to before me this 23rd day of November A. D. 1899.

GEORGE L. GRAEHL, *Clerk.*

9 & 10 TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM BABCOCK, Defendant.

The Toltec Ranch Company, a corporation, plaintiff, in reply to defendant's answer to the plaintiff's complaint filed herein, admits:

1. That the defendant is and at all times in said answer mentioned was the authorized agent of Louisa Babcock, his wife.

2. Admits that the said Louisa Babcock, and her predecessors in interest, have held and occupied the premises mentioned exclusively for more than thirty years since her entry upon the same in 1867.

3. Plaintiff not being informed neither admits nor denies that the lands in controversy were within the Government grant to the Central Pacific Railroad Company.

4. Plaintiff denies that the permanent improvements placed upon the premises by the defendant, or the predecessors of the defendant were of the value of $1500, or of any greater value at the time than $400.

5. Plaintiff denies that the action is barred by any section of the statute of limitations cited by the defendant in his said answer.

6. All other material allegations in the defendant's answer not controverted by the complaint are hereby denied.

CHASE AND CHASE,
Att'ys for Plaintiff.

11 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM BABCOCK, Defendant; LOUISE BABCOCK, Intervener. } Answer.

The defendant above named, for answer to the complaint of the plaintiff herein, denies each and every allegation in the said complaint contained. This defendant further alleges that she and her predecessors in interest who were all citizens of the United States and qualified and competent pre-emptors and homesteaders settled upon the land in dispute prior to the 20th day of October 1867, and ever since have cultivated and improved the same, in compliance with the laws of the United States applicable to the disposal of public lands to settlers, in order to mature title to themselves; that she and her predecessors have made lasting and valuable improvements on said lands, such as a house, stable, stock yards, corrals, digged welis, planted gardens, and built roads, and have broken,

cleared and cultivated a large portion of said lands; that her improvements are reasonably worth and have permanently enhanced the value of the said lands to the extent of $1500.00.

This defendant further alleges that the said lands were at all times mentioned public lands of the United States; that at the time the grant to the Central Pacific Railroad Company took effect said lands were cultivated, improved, and occupied, appropriated, interdicted, reserved and excepted land, and was not of a character contemplated by the grant to the said railroad company.

12 Defendant further answering and for a defense alleges: That those under whom she purchased and through whom she claims and their vendors have been in the actual, peaceable exclusive and quiet possession of said lands and premises and held the same and every part thereof with all the improvements thereon openly, notoriously and adversely to said plaintiff, and to all the world, except the United States, for more than 32 years last past and prior to the commencement of this suit; and said cause of action is barred by the statute of limitations as provided by sections 2869, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2870, 2871, 2872, pages 634, '35, '36 of the Revised Statutes of Utah, title 73, ch. 3; and defendant here specially pleads and relies on the statute of limitations from 1868 to the present time as a complete defense to this suit; and having fully answered all the allegations of the complaint, the defendant prays to be hence dismissed with her costs, and should the defendant prove a better title to the property, then, and in that event, this defendant asks judgment for the full value of all lasting improvements made upon the land by this defendant Louise Babcock and by those under whom she claims, in accordance with sections 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028 of an act concerning and occupying claimants Revised Statutes of Utah, 1888, ch. 7, page 473.

13 This defendant Louise Babcock, for a cross-complaint against the plaintiff alleges:

That the northwest quarter of the southeast quarter and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter and northeast quarter of the southwest quarter of section 17, tp. 11, N. R. 2 W. in Box Elder county, Utah, which includes the land in dispute was settled upon occupied and improved prior to October 20th, 1868, by Alonzo Packer and other citizens of the United States, that on the 20 day of October, 1868, they were in the open, notorious, exclusive and adverse possession of the same to all the world except the United States. That as soon as the land office opened in Utah in May 1869, and as soon as the survey was filed Alonzo Packer filed a pre-emption declaratory statement No. 786, covering the above-described land; that the said statement was accepted and made a matter of public record on May 24th, 1869. Defendant further alleges that the land in dispute was excepted and reserved from the grant.

1st. Under section 3 of the act of July 1, 1862 (12 Stat. 489) by virtue of the settlement of Packer and others made prior to the

date of definite location, accompanied by a filing as soon as the land office opened.

2nd. Under section 4 of the act of July 2, 1864, (13 Stat. 356), which provided that the grant shall not defeat or impair any pre-emption claim.

3rd. Under section 4 of the act of July 2, 1864 (13 Stat. 356) which provided that the grant shall not include "the improvements of any *bona fide* settler."

On the 4th day of June, 1896, D. P. Tarpey, as grantee, made a deed to the Toltec Ranch Company, duly executed, certified and acknowledged and purporting to convey to plaintiff the lands in controversy.

On the 5th day of September 1896, under a mistake and entirely without authority of law a patent of the United States was issued purporting to convey to the Central Pacific Railroad Company
14 under the acts of Congress, granting lands to the Pacific railroads the lands in controversy.

On November 4th, 1897, the C. P. R. R. Co., as grantee, made a deed to the Toltec Ranch Company, duly executed, certified and acknowledged and purporting to convey to plaintiff the lands in controversy. Ever since long prior to Oct. 20 1868 the date of definite location of the C. P. R. R. up to the present time the plaintiff and her predecessors have been in the open, notorious, exclusive and adverse possession of said lands. D. P. Tarpey was familiar with the above facts and is and was ever since the organization of the Toltec Ranch Company a director in said company.

Wherefore Louise Babcock asks that said patent be annulled and set aside and for such other and further relief as may be just.

B. H. JONES,
Attorney for Defendant.

STATE OF UTAH, }
County of Box Elder, } *ss:*

Louise Babcock, being first duly sworn deposes and says, that she is the defendant in the above-entitled action, and that she has heard read the foregoing answer and cross-complaint, and knows the contents thereof and that the same is true of her own knowledge except as to the matters and things therein stated on information and belief and that she believes it to be true.

LOUISE BABCOCK.

Subscribed and sworn to before me this — day of February, A. D. 1900.

B. H. JONES,
Notary Public.

15 In the District Court in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK and LOUISE BABCOCK, Impleaded as Intervener, Defendants.

Comes now The Toltec Ranch Company, plaintiff herein and to the cross-complaint of Louisa Babcock filed herein by leave of the court, as intervener, and for answer thereto denies each and every material allegation thereof.

Specifically denies that Alonzo Packer, or any other citizen of the United States, acquired at any time by settlement, occupation or improvement, or in any other manner, any inchoate right to or interest in the lands in controversy in 1868, or at any other time, or at all, or with the intention or design to acquire such lands by homestead or pre-emption, or that any such rights were acquired by any person.

Plaintiff further answering admits that on the 5th day of December 1896, the United States issued patent to the Central Pacific Railroad Company for the northwest quarter of the southeast quarter, the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter; and the northeast quarter of the southwest quarter of section 17, township 11, north range 2 west, and that such patent covered the lands involved in this suit. Plaintiff also further admits that on December 4, 1897, the said Central Pacific Railroad Company deeded the same lands in fee to The Toltec Ranch Company, plaintiff herein.

G. R. CHASE,
Att'y for Plaintiff.

16

STATE OF UTAH,
County of Box Elder.

Edward R. Chase being duly sworn says: I am the authorized agent of the Toltec Ranch Company; I have heard the foregoing answer read, and know the contents thereof, and that the same is true of my own knowledge, except as to such matters as are stated on information and belief and as to those matters I believe it to be true.

EDWARD R. CHASE.

Sworn and subscribed to before me this 24th day of February, 1900.

G. R. CHASE,
Notary Public.

My commission expires June 2, 1903.

17 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
WILLIAM BABCOCK and LOUISE BABCOCK, Defendants.

Verdict in Action in Ejectment.

We, the jury empanneled in the above-entitled cause, fined the issues joined herein in favor of the defendants and against the plaintiff "No cause of action."

C. J. HARTWELL, *Foreman.*
N. J. LARSEN.
WILFORD REEDER.
LARS LARSEN.
HENRY WAGSTAFF.
H. W. PIERSON.

Dated July 3, 1890.

18 In the District Court of the First Judicial District of the State of Utah, County of Box Elder—Hon. Charles H. Hart, Judge.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
WILLIAM BABCOCK & LOUISE BABCOCK, Defendant-.

Judgment on Verdict in Open Court 3″ Day of July, A. D. 1900.

This action came on regularly for trial. The said parties appeared by their attorneys, Chase & Chase & T. D. Johnson, E-qs. counsel for plaintiff, and B. H. Jones, Esq. counsel for defendants. A jury of eight persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict and subsequently returned into court, and, being called, answered to their names, and say

We, the jury impaneled in the above-entitled case find the issues joined herein in favor of the defendants and against the plaintiff.
"No cause of action."

C. J. HARTWELL, *Foreman.*
P. J. LARSEN.
LARS LARSEN.
H. W. PIERSON.
WILFRED REEDER.
HENRY WAGSTAFF.

Dated July 3, 1900.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of the defendants and against the plaintiff, "no cause of action," and defendants' *and* costs and disbursements incurred in this action amounting to the sum of $63.40.

Judgment entered 11th day of July A. D. 1901.

Witness my hand and seal of said court, hereto set on this 11 day of July A. D. 1901.

[SEAL.]

JOSEPH JENSEN, *Clerk*,
By AMELIA GRAEHL,
Deputy Clerk.

[Endorsed:] No. 270 District court, first judicial district, county of Box Elder, State of Utah. Toltec Ranch Co. plaintiff *vs.* William Babcock & Louise Babcock, defendant-. Judgment on verdict. Filed 11" —— A. D. 1901. Joseph Jensen clerk. By Amelia Graehl, deputy clerk.

19 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
WILLIAM BABCOCK and LOUISE BABCOCK, Defendants.
} Certificate No. 270.

STATE OF UTAH,
County of Box Elder, } *ss:*

I, the undersigned, clerk of the district court of the first judicial district in and for the county of Box Elder, State of Utah, do hereby certify that the foregoing is a true copy of the judgment rendered in the above-entitled action, and recorded in Judgment Book One of said court at page 401.

And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and seal of said court hereto set on this 11th day of July, A. D. 1901.

JOSEPH JENSEN, *Clerk*,
By AMELIA GRAEHL,
Deputy Clerk.

20 STATE OF UTAH, }
County of Box Elder. }

In the District Court, First Judicial District, in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation Duly Organized under the Laws of the State of California, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant. } 278.

The plaintiff complains and alleges: That plaintiff is and was a corporation organized and existing under the laws of the State of Utah; that on the — day of ——, A. D. 1899, at Deweyville, in Box Elder county, the plaintiff The Toltec Ranch Company, was the owner of the following-described goods and chattels of the value of two hundred dollars to wit—two stacks of hay and nine sacks of alfalfa seed.

II.

That the defendant on the — day of —— at Deweyville in the county of Box Elder without plaintiff's consent and wrongfully took said goods and chattels from the possession of the plaintiff.

III.

That before the commencement of this suit, on the 30th day of September, A. D. 1899, the plaintiff demanded from the said defendant possession of said goods and chattels.

IV.

That said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff to
21 the damage of the plaintiff in the sum of two hundred dollars.

Wherefore plaintiff demands judgment against the defendant.

First. For the recovery of said goods and chattels or for the sum of two hundred dollars the value thereof in case a return thereof cannot be had.

Second. For one hundred dollars damage and costs of suit.

CHASE AND CHASE,
Att'y- for Plaintiff.

STATE OF UTAH, }
County of Box Elder, } *ss:*

Edward R. Chase being duly sworn says: I am the agent of the plaintiff corporation in this action. I have read the complaint and know the contents thereof, and that the same is true of my own knowledge except as to the matters as are stated on information and belief, and as to those matters I believe it to be true.

EDWARD R. CHASE.

Sworn to and subscribed before me this 30th day of September, A. D. 1899.

GEO. R. CHASE,
Notary Public.

My com. ex. June 3, 1903.

22 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant.
} Demurrer.

Now comes the above-named defendant and demurs to the complaint on file herein and for ground of demurrer alleges:

1st.

That the plaintiff has not legal capacity to sue.

2nd.

That the complaint does not state facts sufficient to constitute a cause of action.

B. H. JONES,
Attorney for Defendant.

Dated this 19th day of October, A. D. 1899.

Received a copy of this writ this 19th day of October, 1899.

CHASE AND CHASE,
Attorneys for Plaintiff.

23 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant.
} Order Overruling Demurrer.

This cause coming on to be heard on the demurrer of the defendant herein to the complaint herein, and the same having been argued by counsel, and the court being fully advised in the premises, it is ordered that the said demurrer be overruled, and the said defendant given ten days in which to answer.

CHAS. H. HART, *Judge.*

Entered on the minutes of court.
Dated Nov. 8, 1899.

24 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant. } Answer.

The defendant above named, for answer to the complaint of the plaintiff herein, denies each and every allegation in the said complaint contained.

The defendant further alleges that he holds the said property described in the complaint, as agent of his wife, Louise Babcock, and that he and his wife, are over the age of twenty-one years; that he is the head of a family, and a qualified and competent pre-emptor and homesteader, and that his said wife, and her predecessors in interest settled upon the land, upon which said property described in the complaint was grown on or about the — day of —— 1867, and ever since occupied, cultivated, and improved the same, in compliance with the laws of the United States applicable to the disposal of public lands to settlers in order to mature title to themselves; that she has made lasting and valuable improvements on said lands, such as a house, stable, stock yards, corrals, digged wells, planted gardens, and built roads, and has broken cleared and cultivated a large portion of said lands; that her improvements are reasonably worth and have permanently enhanced the value of the said lands to the extent of $1500.00.

This defendant further alleges that the said lands, upon which said property was grown, were at all times mentioned public lands of the United States; that at the time the grant to the Central Pacific Company took effect the said land was cultivated, improved and occupied appropriated, interdicted, reserved and excepted land, and was not of the character contemplated by the grant to the
25 said railroad company under which the plaintiff pretends to claim title.

Defendant further answering and for a defense alleges:

That he and his wife Louise Babcock and those under whom she purchased and through whom she claims, and their vendors have been in the actual, peaceable, exclusive and quiet possession of said lands and premises upon which said property was grown, and hold the same and every part thereof with all the improvements thereon openly, notoriously and adversely to said plaintiff, and to all the world, except the United States, for more than 32 years last past and prior to the commencement of this suit, and any cause of action for said lands or for the crops thereon, is barred by the statute of limitations, as provided by sections 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2869, 2870, 2871, 2872, page- 634, '35, '36 of the Revised Statutes of Utah, title 73, chapter 3, and defendant here specially pleads and relies on the statutes of limitations from 1868 to the present time as a complete defense to this suit; and

having fully answered all the allegations of the complaint, the defendant prays to be hence dismissed, with his costs.

B. H. JONES,
Attorney for Defendant.

STATE OF UTAH, }
County of Box Elder, } ss:

B. H. Jones, being first duly sworn deposes and says, that he is the attorney for the defendant in the above-entitled action, and that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to matters and things stated on information and belief, and that he believes it to be true. This affiant makes this affidavit for the reason that defendant is absent in the southern part of the State of Utah.

B. H. JONES.

Subscribed and sworn to before me this 23rd day of November, A. D. 1899.

[SEAL.] GEORGE L. GRAEHL, *Clerk.*

26 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant. } Order.

Good cause appearing therefor, it is hereby ordered that Louisa Babcock be permitted to file complaint in intervention and answer herein.

CHARLES H. HART, *Judge.*

Entered on the minutes of the court.
Dated Nov. 8, 1899.

27 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
WILLIAM BABCOCK and LOUISE BABCOCK, Defendants.

Verdict in Action for Claim and Delivery.

We, the jury, empaneled in the above-entitled cause find the issues joined herein in favor of the defendants and against the plaintiff, "no cause of action."

C. J. HARTWELL, *Foreman.*
P. J. LARSEN.
WILFORD REEDER.
LARS LARSEN.
HENRY WAGSTAFF.
H. W. PIERSON.

Dated July 3, 1900.

28 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, Plaintiff, *vs.* WILLIAM BABCOCK and LOUISE BABCOCK, Defendants.	Judgment on Verdict in Open Court 3rd Day of July, A. D. 1900.

This action came on regularly for trial. The said parties appeared by their attorn-ys Chase and Chase and T. D. Johnson, Esqrs. counsel for plaintiff, and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called answered to their names and on their oaths say: We, the jury empaneled in the above-entitled cause, find the issues joined herein in favor of the defendants and against the plaintiff, "no cause of action."

C. J. HARTWELL, *Foreman.*
P. J. LARSEN.
WILFORD REEDER.
LARS LARSEN.
HENRY WAGSTAFF.
H. W. PIERSON.

Dated July 3, 1900.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said judgment herein be in favor of the defendants and against the plaintiff "no cause of action," and defendants' costs and disbursements incurred in this action, amounting to the sum of $78.90.

Judgment recorded the 11th day of July, A. D. 1901.

Witness my hand and seal of said court hereto set this 11th day of July, A. D. 1901.

JOSEPH JENSEN,
By AMELIA GRAEHL, *Deputy.*

29 *Clerk's Certificate.*

(Same as on page 42.)

30 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM BABCOCK, Defendant, and Louisa Babcock, Intervener.	Bill of Exceptions. Nos. 270 and 278.

Be it remembered that the above-entitled action being No. 270, and a suit in ejectment brought by the plaintiff against the defendant, and in which the said intervener by leave of court intervened in said action, came on regularly for hearing on the 2nd day of July, 1900, when the following proceedings were had: Messrs. Chase and Chase and T. D. Johnson, appeared as attorneys for plaintiff, and B. H. Jones appeared as attorney for the defendant and intervenor.

By stipulation of the parties in open court, an order was made her-in consolidating the above-entitled action, viz. No. 270 and action No. 278, pending in the above-named court, being a suit between the above-named plaintiff and the above-named defendant and intervenor, and being in claim and delivery for certain personal property grown upon the lands and premises described in the complaint in said action No. 270, and it was stipulated between the said parties, and ordered by the court, that the above-named actions shall be tried together, and all matters and things determined
31 therein shall be with like force and effect, as if each of said actions had been tried separately and independently.

Thereupon the court directed the clerk to call a jury. Under the objection of Mr. T. D. Johnson as hereinafter set out, it was shown from the records of the court and the papers on file in the above-entitled actions:

That at the time of the filing of the petition or complaint of the intervener herein, she filed in each of said causes, an affidavit of impecuniosity, in due form as provided by law; that said causes were set on the 1st day of May, last, for trial, at which time in open court the attorney for defendant and intervener orally demanded a jury for the trial of said causes; that at no time had plaintiff ever demanded a jury trial, and the jury fee of five dollars had never been paid by the defendant or intervener in either of said causes.

Mr. JOHNSON: The plaintiff objects to the calling and empannelling of a jury to try these cases for the reason that when these cases were set for trial in open court, at the time the defendant and intervener made the demand orally for a jury, no deposit of five dollars as jury fee provided by the statute was made with the clerk in said actions.

The COURT: The impecunious affidavit would take the place of the jury fee, and entitle the parties to a jury without such payment. The objection may be overruled.

To which ruling of the court the plaintiff duly excepted.

A jury was thereupon called and empanneled to try said causes.

The plaintiff introduced in evidence Book "Q" of Deeds of the records of the recorder's office of Box Elder county, Utah, and pages 333 to 345, both inclusive in said record, the same being the record of the patent of the United States to the Central Pacific Railroad Company as grantee, to the lands in controversy, bearing date the 5th day of September, 1896, and recorded on the
32 — day of —— 189–. Following is the description of the premises set out in said patent: The southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, the west half of the southeast quarter, and the east half of the southwest quarter of section 17, township 11, north range 2 west, Salt Lake meridian, U. S. survey, and situate in Box Elder county, State of Utah.

Plaintiff introduced in evidence a certain deed from the Central Pacific Railroad Company to plaintiff conveying the above-described lands bearing date the 4th day of November, 1897, and recorded in the office of the recorder of Box Elder county, State of Utah, on the — day of —— 189– marked Plaintiff's Exhibit 1.

A true copy of which said patent and a true copy of which said deed are hereto attached and marked Plaintiff's Exhibits "0" and "1" respectively.

Plaintiff introduced in evidence the articles of incorporation of the plaintiff corporation, a true copy of which *are* attached hereto and marked Pl'ff's Ex. 2.

E. R. CHASE was duly sworn on behalf of plaintiff and testified as follows: That I am acquainted with the lands described in the complaint in the said action of ejectment; the defendant and intervener were occupying the premises in the year 1899, had been for some years prior thereto; I visited the premises in the year 1899 some time before the commencement of this action, demanded of Mr. and Mrs. Babcock about twenty-five tons of hay and nine sacks of alfalfa seed which had been cut and grown on said premises, and were there on the lands at the time; I demanded it in behalf of the plaintiff as its agent; they refused to give up either the hay or the alfalfa seed; claimed both as their own; said the land was theirs. Am acquainted with the market value of hay and alfalfa seed as it was at that time when I made the demand and when these suits were brought; the hay was worth about one hundred dollars; the seed about seventy-five dollars.

Mr. JOHNSON: I ask leave to amend the complaint by making specific allegations of plaintiff's incorporation under the laws of the State of California.

The COURT: It may be done.

Plaintiff rests.

33 MARY ALLEN DEWEY, a witness called in behalf of the defendant and intervener, being first duly sworn testified as follows:

Direct—Examined by Mr. JONES:

I reside at Deweyville, Box Elder county, Utah; have resided there 36 years; know where Mrs. Babcock resides; am acquainted with the land; I live within a mile or three-quarters of a mile from her; a number of people one after another occupied these lands from about 1864 until one Lish got it; he remained there until he sold to Mr. Loveland; I do not know just what year that was; I have known Mrs. Louisa Babcock about 32 years; she was the plural wife of Chester Loveland; she moved upon the land in dispute about 25 years ago and has lived there ever since; she used it for a home, for farming and cut hay and to support her family; do not know what proportion of the land has been cultivated during that period of time; Mrs. Babcock has a family; six or seven children, who have lived with her on the land; she married Mr. Babcock ten or eleven years ago; he has been living there since that time; there is no difference at all between the way the people who have occupied this land have used it, and the way any other farmer used theirs.

Cross-examination by Mr. JOHNSON:

I live north of Mrs. Babcock; my farm is in the section just north of 17, an even section, Government land; Lish was followed by Loveland; I don't know anything about the relation of Lish and Loveland, except their word for it; I had it from both parties they had sold to each other; Mr. Loveland I understood succeeded to Lish; that was the understanding in the neighborhood.

Q. How long was it understood in the neighborhood that Mr. Loveland was the party that owned the land?

A. From that day till this.

Q. Is that the only understanding now?

A. It is with me.

34 —. Is it with the neighbors; you have talked to them?

A. Yes sir.

Q. That's the general understanding in the neighborhood?

A. I can't answer for any but myself.

Q. You've talked about it, have you with your neighbors—whose lands?

A. I don't know any of them expressed that any more than they didn't think Mrs. Loveland ought to lose her land.

Q. Mrs. Loveland is the plural wife of Mr. Loveland?

A. Yes sir.

Q. How long has he been dead?

A. 12 or 14 years.

Q. You understood, also, didn't you, that Mr. Loveland had contracted with the railroad company for that land?

A. Never.

Q. What did you understand?
A. I understood that he gave that to his wife as her home.
Q. He was going to buy it, and get title to it.
A. I don't know anything about it.
Q. You never heard how he was to get title to it?
A. No more than I supposed they owned it, and it was her home.
Q. You didn't know how he acquired title to it?
A. No.
Q. You never heard him say?
A. No, sir.
Q. Never heard Mr. Loveland say?
A. No sir.
Q. Never heard anything about it?
A. Given to her when she moved there.
Q. You are not sure when she did move there?
A. I'm not sure right to the day of the month; somewhere about 24 years ago I believe; 24 or 25, I wouldn't say which. I know Anson Loveland and Orson Loveland; they lived at Deweyville, before Chester Loveland their father died; it has been a good many years since Anson lived over there; Orson lives there yet; about a
35 quarter of a mile from Mrs. Babcock; didn't understand that he had anything to do with this land; Mr. Loveland, the old gentlemen Chester lived at Brigham City, and Mrs. Loveland, now Mrs. Babcock, lived over there on the land; Mrs. Babcock was Mr. Chester Loveland's plural wife; she is not the mother of Anson or Orson; don't think Anson or Orson ever lived on this land.
Q. Do you know what land this is Mrs. Babcock claims she owns?
A. It's her home that Mr. Loveland left her. It is 62 acres; I don't -now how much has been cultivated; I think it has all been fenced; didn't understand that Mrs. Babcock's home was 30 acres around the house; understood that it was 62 acres; have so understood eight or ten years; so understood from her and from other parties, hearing it talked about; I knew Carl Loveland; never heard him talk about it; never heard C. C. Loveland say anything about it.
Q. Who did you hear say anything about it except Mrs. Loveland herself?
A. I don't know as I heard anything said about it except Mrs. Babcock, and neighbors talking about it.
Q. That is since this lawsuit commenced?
A. No, sir; all the time. Been her home since she lived there. I had an understanding that it has been her home.
Q. I'd like to refresh your recollection, Mrs. Dewey, and state if it isn't a fact that Mr. Chester Loveland claimed in his lifetime a great deal of land around that neighborhood, and before he died parcelled it out among his children, with Mrs. Babcock?
A. I have heard—I don't know anything about it—that he did leave certain portion of his land to his children; that through some misunderstanding between them and his son Carl, his oldest son, that that land went into the railroad company's hands, through

some misunderstanding, and the children were robbed of their rights.

36 I didn't hear he (Carl Loveland) had made a contract; I just heard they—the children—lost their land; I heard it a good while ago—I don't know who told me—a rumor—folks talking about it—that the railroad was trying to take advantage of the poor settlers; am positive Mrs. Loveland did not tell me; think it was since Mrs. Babcock married her husband that I heard this rumor; it has been longer than three or four years; can't tell how long.

Q. You understood, didn't you, during all this time, that these people over there in that neighborhood were holding just like you were what would be called a squatter's right?

A. No, sir; I supposed till I heard of this contract between Carlos and the railroad; that they took the children's land—I didn't know but the land was secured.

Q. I thought you told me a little while ago that you didn't know that Carl had a contract.

A. I just heard the children—I don't know as he did—only I heard the children was robbed of what their father had left them. I was speaking of Mrs. Babcock's children; I understood their father left them some; not where Mrs. Babcock lived that 62 acres was Mrs. Babcock's home; it was my understanding he (Chester Loveland) left that to her.

Redirect by Mr. JONES:

Q. I understood you to tell Mr. Johnson your understanding was that Mrs. Loveland had been for the past 25 years the owner of the land in dispute; you meant Mrs. Babcock?

A. Yes.

Q. She's sometimes called Mrs. Loveland and sometimes Mrs. Babcock?

A. I've been used to calling her Mrs. Loveland.

37 Mr. JOHNSON: At this time I wish to state the particulars in which I wish to amend my complaint as suggested this forenoon; to the end of paragraph one of the complaint after the words "of said section" we wish to add the following, "and more specifically described as follows: Beginning at the northeast corner of the southwest quarter of the northeast quarter of section 17, running thence south 64 rods, more or less to a wire fence; thence west 160 rods, more or less, to the west line of the southeast quarter of the northwest quarter of said section 17; thence north 64 rods to the northwest corner of the said southeast quarter of the northwest quarter thence east 160 rods to the place of beginning, except the right of way of the Oregon Short Line railroad across the lands hereinbefore described, 100 feet wide."

Mr. JONES: We object as entirely changing the issues in this case.

The COURT: That is an amendment I think should be permitted. If that takes you by surprise, if there is any reason why a continuance should be granted, that is a different matter. The description is not very certain, definite, and I think the court should permit it

to be made certain and definite. If you can show that would take you by surprise or at any disadvantage by reason of this more perfect description the court will hear you and consider the matter.

Mr. JONES: Note an exception.

38 THOMAS FRYER, a witness called on behalf of the defendant and intervener, being first duly sworn, testified as follows:

Examined by Mr. JONES—Direct examination:

I am 64 years old; live at Deweyville; am a farmer; have lived at Deweyville since the winter of '67 and '68; am familiar with the land described in the complaint; have been acquainted with it since the time mentioned; am acquainted with Mrs. Babcock; have known her since the time she moved to the Deweyville district; there were improvements on this land in '67; was a log cabin, a pole corral and a cellar, some of it fenced in, couldn't state what; in '69 this land was inclosed in the Big Field; the Big Field inclosed all the lands of settlers who had claims, and was protected from roaming cattle; the original inclosure that was inclosed in '69 extended about forty rods south of the south line of the section that Mr. Dewey's land was on, which reached to somewhere within a few feet either on one side or the other, but I couldn't be certain which, of what is commonly called Mrs. Babcock's north fence now, and ran in a southwesterly direction to the river; it didn't follow no line because we didn't find no lines, then it extended to 160 rods north of the south line of 12, and from there circled into a large bend in the river just northwest of where Mr. Gardner now lives; the river on the west constituted a natural boundary that would prevent stock or horses from entering the lands; wasn't necessary to fence that portion; it was fenced on the north, south and east; the fence has been moved back and forward to the east, back a little west, back a little east again I believe about four or five different times, according as county surveyors relocated the lines, people have kept moving their fences a little this way, a little that way according to what each county surveyor would call a county line; the land inside the inclosure that I have stated has been inclosed from that time to the present; the present location of the fences on the lands in dispute must be some 15 or 16 years since they were moved the last time;

39 the fence on the north side of Mrs. Babcock's place was put up by Mr. Loveland shortly after his starting to build there; I don't know as to the south fence; the fence on the east along the county road to the best of my recollection was put up about five years after we enclosed the Deweyville field, they put a continuous fence from the southeast corner of the Deweyville inclosure and continued it right down to Honeyville; from the time the inclosure was made people commenced breaking a little each year, as they could; it would be hard to state when it was all brought into cultivation; there has been a little improvement from that time until the present; there has been a continuous cultivation of portions of it from that time down to the present; the best of my knowledge it has always been cultivated except the slough which runs through

it; so far as I know it is all in lucern; never seen nothing else on it; couldn't state how long it has been cultivated to lucern; Loveland plowed it, but to what extent I don't know.

40 —. Do you remember Chester Loveland being up there?

A. Yes sir.

Q. Remembering his cultivating this land in dispute?

A. Yes sir.

Q. Did he live with his plural wife in that house?

A. I believe part of the time.

Q. Do you recollect when he died?

A. I do not. Quite a number of years ago. * * * I was acquainted with the value of lucern seed in the year 1899; the market value was from three cents a pound for the lowest to seven cents for the finest grades; I know the market value of lucern hay of the character of hay cut from this land in 1899, and 1890; it was from three to three and one-half dollars per ton.

Q. How was this land generally designated, the land in dispute, and how has it been designated in that neighborhood for the past twenty-five years?

A. As the Loveland place.

Q. What was Mrs. Babcock generally called?

A. Mrs. Babcock now, I believe. Great many call her Loveland yet.

Q. For a great many years she went by the name of Mrs. Loveland

A. Yes, sir.

Q. During the time she has been in the possession of that land state what the facts are with regard to cultivation during each and every year?

A. It's been in lucern as far as I could see.

Q. Lucern is a valuable crop in that part of the country?

A. About the most valuable we have.

Cross-examination by Mr. JOHNSON:

O. C. Loveland's house is in the northwest quarter of section 17, I think. Mrs. Babcock is in the southwest quarter of the same to the best of my knowledge; and the Carl Loveland place is in the quarter immediately south; the northwest quarter of the southeast quarter; the Deweyville road runs north and south along the west side of the east tier of forties, the fence on the west side of the road is right on the forty line; the Oregon Short Line railroad

41 runs through the land in dispute. I never had any knowledge that the railroad people invited people on their lands at all; I went upon railroad lands for the purpose of making a home there; did not go upon it at the invitation of the railroad company; I bought and paid the railroad company for the land; I purchased land from it in the '70's.

Q. Did you go on them?

A. What do you mean by going on them?

Q. Use them or improve them, or cultivate them?

A. Certainly, I improved them by degrees.
Q. Who else besides you?
A. That I couldn't state.
Q. Don't you know that Orson Loveland did?
A. I don't know that Orson Loveland did, not at that time. I couldn't state.
Q. Don't you know that Carl Loveland did?
42 A. Well now, that's keeping track of some one else's business that I wasn't doing much of.
Q. Wasn't that the understanding, the general repute in the neighborhood that Orson Loveland, Carl Loveland, Chester Loveland and all those Lovelands were over there on the railroad land and like everybody else was for instance, just like yourself?
A. I can't very well do it without doing it.
The COURT: Answer the question in your own way then.
A. In the latter part of '69, and the early part of '70 was before we really knew which was railroad land and which was Government land, before there was general knowledge of it for the reason the county surveyor himself couldn't find the corners. It cost me over $50.00 to find the first Government corner in that section of the country, and how could I tell which was railroad land and which was Government land until you could get located by the county surveyor.
Q. When did that cease to be the situation so that it was known which was which?
A. I couldn't tell you how extensive it was over the country, but right where I lived it was in the latter part of '69 and '70. I didn't keep track of what my neighbors was doing.
Q. Then about '70, or along there it had been determined in this neighborhood around Deweyville, which were railroad lands and which Government lands?
A. Yes sir.
Q. And isn't it a fact which you know, that the railroad company sent out circulars and letters addressed to the people through that section of the country, telling them to go on their lands, the railroad lands and to make improvements on them such as they saw fit, makes homes on them and that those people who went on the lands should have a preference right to buy the lands at their value, without reference to their improvements, and didn't you do that yourself?
43 A. I don't recollect any such circular. Possibly might have been, but I never saw any of them.
Q. Did you attend a hearing or meeting in 1884 at Brigham City, in this court-house, when there was a gentleman who represented the railroad company by the name of Mills, met with all the farmers and settlers over there in the neighborhood of Deweyville, and in fact all over Box Elder county, with respect to their acquiring the title to the lands which they had been occupying and getting a price fixed and arranging those matters?
A. No, sir; the first time I ever met Mr. Mills was the time he was in Logan selling land.
Q. When was that Mr. Fryer?

A. Couldn't state the year.

Q. It was about '84, wasn't it?

A. Might possibly.

Q. Let me refresh your recollection. Don't you remember that at that time Mr. Mills came back here representing the railroad company, he had a meeting with the farmers in Logan, he had a meeting with the farmers in Brigham and in Ogden in which these matters were discussed?

A. Possibly so. I didn't hear nothing of it, in fact I wasn't at home all the time.

Q. But you did attend the meeting?

A. I was at Logan when he was disposing of the land. He was simply disposing of the land.

Q. You were there and met Mr. Mills?

A. Yes sir.

Q. A great many other people were there and met Mr. Mills?

A. Yes sir.

Q. It was all with respect to the lands they and you had been occupying and which they wanted to secure from the railroal company?

A. That was the purpose of it.

Q. And as a matter of fact in a great many instances arrangements were definitely made at that time between the parties?

44 A. I can't answer for others. I know I got land from Mr. Mills at that time myself.

Q. Where were you living at that time?

A. Deweyville.

Q. Didn't you receive a notice, a written notice of this meeting, or the fact that Mr. Mills was going to be here and to come over and meet him at that time?

B. H. JONES: I make the same objection.

The COURT: Objection overruled.

A. No, sir, I did not. Possibly I might not have been at home. I was down in the mines part of the time. That might have been the reason that I didn't have notice of these meetings.

Q. Tell us how it is you happened to go over to Logan and see Mr. Mills at that time if you didn't receive any notice?

A. General repute all over amongst the people.

Q. It was generally understood amongst all the people that Mr. Mills would be here and for that purpose.

A. He'd be in Logan on a certain day. I made it my business to go over there because I wanted to purchase some land.

Q. As I understand from the remarks that you have made heretofore, you had been occupying this land before, that you at that time secured from the railroad?

B. H. JONES: Same objection.

A. Yes sir.

The COURT: Objection overruled.

B. H. JONES: I can have a general exception to all this testimony?

The COURT: Yes.

45 A. As I stated before, we didn't know what we was living on at first, for the reason the county surveyor couldn't give us the information.

Q. Isn't it a fact that in a great—in fact all the cases, practically, in which the people went and bought land from Mr. Mills at that time had been occupying it prior to the time that he came out there?

A. Some of them had, I suppose, some hadn't.

Q. You know that some had?

A. Some had; I'm well aware of that.

Q. Isn't it a fact, that you, a great many years before had filed an application for the purchase of the land which you did buy at that time, a written application with the railroad company?

A. No, sir.

Q. You had simply been occupying it?

A. Yes, sir.

Q. You do know, don't you, as a matter of fact that a great many persons had filed such applications?

A. I don't know anything about it.

46 Redirect by Mr. JONES:

Q. You may state whether or not William H. Mills, land agent for the Central Pacific Co. forwarded you a list of its lands?

A. Yes sir.

Q. Have you the list with you?

A. Yes sir.

Q. Let me look at that list. I- reply to the letter you sent to Mr. Mills, you received this list?

A. Yes sir.

Q. About what date was this?

A. It was when I first heard that Mr. Mills was anticipating coming through here to dispose of the railroad lands, quite a number of years ago; I couldn't state just what year it was. I wanted to purchase, and I wanted to see if I was on the list or not.

Mr. JONES: I offer this list in evidence, for the reason that the notoriety counsel speaks of, the very class of cases counsel speaks about is described right here in this notice of the railroad company, in which they offer for sale the Central Pacific Railroad lands, and which shows there was no claim whatever made to the lands in dispute.

Mr. JOHNSON: I object to it as incompetent, irrelevant and immaterial, and no proper foundation having been laid for it. My theory is this: there were certain railroad lands over there and they held out an invitation to the people to get on them, and that they would permit them to buy them.

The COURT: This was among that class of lands.

Mr. JOHNSON: The premises in dispute were among that class of land; but every acre on that description a patent had issued for.

The COURT: The objection may be overruled. It may be admitted.

Exception noted.

(The said list was received in evidence and marked Defendant's Ex. 8. Said list is a circular containing a great number of descriptions of lands offered by the railroad company for sale.)

Recross-examination by Mr. JOHNSON:

A. I couldn't tell just when I got this list; I've stated as far as I possibly can; just before we got word that Mr. Mills was coming through here, and it was just before that date; when I say "we got word" I mean the people generally; we heard Mr. Mills was coming through to dispose of the railroad lands; I then sat
47 down and wrote for a list; the land I bought from the railroad company was patented land; so far as I understood it hey were not selling any lands except patented lands.

MILO V. GARDNER, a witness in behalf of defendant and intervenor, being first duly sworn, testified as follows:

Direct examination by Mr. JONES:

A. I reside at Deweyville; have lived there since '68; am 65 years old; am a farmer; live about a mile and a quarter from the land in dispute; have been acquainted with the land since 1868; was all sage-brush land at one time; in order to cultivate it it was necessary to clear the sage brush off; the land has been used since 1868, farming it, clearing it off, putting up fences; it is all in cultivation now except the slough; it was begun to be cultivated in 1868, and they kept right on until they got it all cleared up; I couldn't say when they finished; know nothing about that; was cultivated to wheat, lucern, tried to raise some corn; as fast as they could get it under cultivation it's been cultivated, each and every year; in the spring of '68 every man put up his front fence, along the road, and then they ran a fence from this land through to the river, to protect the crops, and we fenced on the north; all this land except the southeast corner has been inclosed with a substantial fence since 1868; about five years later the Honeyville fence was built, and all of this land has been inclosed since that time; have been acquainted with Louisa Babcock since she moved out there, between 20 and 25 years.

Q. What is the fact as to her cultivating this land in dispute, and improving it during the years that she has been in possession of it?

A. Why she tended to it the same as the rest of us have, or had it done by her children.

Q. Each and every year since she went there?

A. Yes, sir; that is since Uncle Lester died. Before that he tended to it.

48 I know Anson and Orson Loveland, they lived up there north of where Mrs. Babcock lived; part of the land was left to them; he gave them a pi-ce of land; he gave Orson a piece; he gave Anson a piece and he gave Mrs. Babcock a piece. Orson occupied the land north of Mrs. Babcock's land; he owns it now. The land that Orson bought from the railroad I do not consider belonged to the railroad; that is part of the same land the old man when he died divided up between Orson and Anson and the widow. He had all these years that Mrs. Loveland or Mrs. Babcock, the widow, has been over there Orson has lived right north of her; Anson lived in the house that Mrs. Babcock lives; Anson never lived on this land in dispute that I know of.

49 Cross-examination by Mr. JOHNSON:

Q. It was Uncle Lester's place then, up to the time he died?
A. Supposed to be; he lived there; that was his home.
Q. Mrs. Babcock, who now is, was then his plural wife?
A. Yes sir.
Q. And Chester Loveland lived over there, and it was his home, so understood, so far as you know.
A. Yes sir.

Redirect by Mr. JONES:

Q. During all the time that you knew Chester Loveland, Louisa Babcock was living in this house on the land in dispute and getting the profits of the land?
A. Yes sir.
Q. But she was the plural wife of Chester Loveland, and he used to come up there and live with her?
A. That's what he told me.
Q. Did you understand that it was Chester Loveland's land or Louisa Loveland's?
A. It went to her after he died. He left it with her; said that it was her home; that was the understanding of all the people; that was her land—her home; left for her. When he did die that was to be her place.

CLEM HORSLEY, a witness called in behalf of the defendant and intervenor, being first duly sworn, testified as follows:

Direct examination by Mr. JONES:

Q. What is your name?
A. Clem Horsely.
Q. What is your occupation?
A. County treasurer of Box Elder county.
Q. How far back have you the records showing what property had been assessed in this county?
A. 1889.

It was thereupon stipulated that the said witness could make out a statement from the records in his office showing the tax assess-
50 ments shown against the lands in controversy in this action, and the same admitted in evidence herein; which said statement is attached hereto and marked Defendant's "Exhibit 4."

Mr. JONES: I have here, and offer in evidence, a certified copy of the letter of the Commissioner of the General Land Office, dated May 15th, 1869, addressed to the register and receiver at Salt Lake City, Utah.

Mr. JOHNSON: I object to it as incompetent, irrelevant and immaterial.

The objection was overruled, to which ruling of the court the plaintiff excepted.

Received in evidence and marked "Defendant's Exhibit 5."

Mr. JONES: I offer in evidence a letter dated Oct. 16, 1872, addressed to the register and receiver at Salt Lake City, Utah, certified to by the Commissioner of the General Land Office.

Mr. JOHNSON: I object to it as incompetent, irrelevant and immaterial.

The objection was overruled, to which ruling of the court the plaintiff excepted.

Received in evidence and marked "Defendant's Ex. 6."

Mr. JONES: I offer in evidence a tax-sale certificate showing tax sale of land in controversy to Box Elder county.

Same was received in evidence and markd "Defendant's Ex. 7."

Defendant and intervener rest.

51 Mr. JOHNSON: We now move the court for a nonsuit against Louisa Babcock, on her cross-complaint, and also move the court for a peremptory instruction to the jury to find in favor of the plaintiff and against the plaintiff on the complaint, as against both and each of said defendants, and this motion to apply to both suits now being tried; for the reason that the defendants have failed to make out any right to recover on said cross-complaint, as against the plaintiff, and the defense interposed on behalf of these defendants and each of them as against plaintiff's complaint fails to interpose any facts or evidence which this court should submit to the jury, and that there is not sufficient testimony to go to the jury upon any question involved in the issues in this action.

The COURT: There is no direct testimony that I remember here that the defendant was claiming adversely to the company, or just how she was claiming, inferences might be drawn from the testimony. As the case now stands it would have to be submitted in connection with the testimony of her occupancy, the statutory provision. The court will have to submit the case to the jury under adverse possession.

To which ruling of the court the plaintiff duly excepted.

52 D. P. TARPEY, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. JOHNSON:

A. I am manager of The Toltec Ranch Company, the plaintiff; have been since 1896; I sometimes attend to land business for the Central Pacific Railroad Company; I have been familiar with its lands in this section of the country in a general way since 1884; I attended the meeting when Mr. Mills met the settlers in this part of the country at Brigham City; it was in November, 1884, and was held here in the court-house; the people in general who were interested in railroad lands were present at that meeting; Mr. Chester Loveland was there; the object of the meeting was to sell the lands of the railroad company to the applicants to purchase, that is, the lands that were patented at that time to the railroad company; every acre of the land shown on the list that has been introduced in evidence here was patented at that time to the Central Pacific Railroad Company; I heard a conversation between Chester Loveland and Mr. Mills at that meeting; Mr. Loveland spoke to Mr. Mills about his lands up there, and wanted to know why those lands were not on the list for purchase. Mr. Mills told him that they were only selling patented lands; Mr. Loveland referred to lands in section 17 where he had some improvements; Mr. Loveland stated that he wanted to purchase them whenever they were ready to sell them; that he had cultivated them, had improved them, and he was told that under those circumstances of course under the rule of the company he'd be given the preference right to purchase; the rule of the company was to give the occupants of land the preference right to purchase them when they came into the market.

Q. State what you know in regard to the policy of the company of inviting settlers to enter upon and improve these lands, with what ultimate object in view, and how long had that been?

A. They had such a policy, and they issued circulars from early in the sixties up to late in the seventies.

53 Q. And in a general way what did they say?

A. They invited people to settle on their lands and cultivate and improve them, and assured them that — would have the preference right to purchase when the lands came in the market, not taking into consideration the value of any improvements that they put on the lands.

Q. What do you mean by "when they came into the market"?

A. When the company got ready to sell them.

Q. At this time when this conversation occurred as I understand you, that was reached only after patent issued?

A. At that time that was the policy of the company not to sell any land but what was patented.

Q. I will ask you to state whether or not at this time, 1884, and prior thereto lands of the railroad company in the vicinity of this land that Mr. Loveland was occupying, and in fact throughout all this section of the country was being occupied by settlers in this way?

A. They were. That's a matter of history.

54 Q. I'll ask you to state what the settlers on these lands did with them?

A. In some instances they lived on them, and some they inclosed with fence.

Q. If they didn't cultivate and didn't reside on the land or fence them, then what?

A. Then there was no preference right with the company at all. They could sell them to anybody.

Q. As a matter of fact will you state whether or not rh- company had through these years, when persons had gone upon these lands, and occupied them and improved them, give- them the preference right to purchase at the ruling or established price?

A. Yes. They graded them. They regraded some lands. The lands were originally regraded, I think early in the eighties, and as the value of land increased in the meantime they raised their grade. In some instances they lowered.

Q. You will please state whether or not prior to this time when Mr. Loveland had come and met Mr. Mills, any applications had been filed for any of this section 17?

B. H. JONES: I object. The application itself would be the best evidence.

The COURT: Objection sustained.

Q. Have you in your possession any applications that were filed upon this land with the railroad company or the land department of the railroad company?

A. I have.

Q. Will you please produce them? This document which I hold in my hand is such an application, is it?

A. Yes.

Q. Where did you get it?

A. I got it from the files of the railroad company land office in San Francisco.

55 Mr. JOHNSON: We offer it in evidence.

B. H. JONES: I object as immaterial, irrelevant and incompetent, no application of Louisa Babcock.

The COURT: Orson Loveland isn't connected with this plaintiff to make that competent proof. Objection sustained.

Exception noted.

Q. Do you know where the situation of where Mr. Chester Loveland or Mrs. Babcock lived during these years; where the house was with respect to where Orson Loveland or Anson Loveland lived over there?

A. I never met Anson Loveland, but Mrs. Babcock and Orson Loveland lived within a couple of hundred yards of one another, I guess. They are only living on different forties.

Q. What forty does Orson Loveland live on and did then?

A. He lives on the forty north of the land claimed by Mrs. Babcock.

Q. It's in this same section?
A. Yes sir.
Q. And Orson Loveland bore what relation to Chester Loveland?
A. His son.
Q. And Chester Loveland was the husband of Mrs. Babcock at that time; she was the polygamous wife of Chester Loveland?
A. So I understood.
Q. Do you know about when Orson Loveland lived over there. When he went there?
A. No, I do not.
Q. When was he living there first, so far as you know?
A. He was living there ever since I've been in the country.
Q. That's been since 1884?
A. Yes.
Q. Who occupied any other of the quarters, or of the forties of this section 17?
A. Orson Loveland occupied some of it.
Q. What part?
A. He occupied a part of the land now claimed by Mrs.
56 Babcock.
Q. What part?
A. The northern part adjoining his. He also occupied the north half of the northwest quarter, under contract of purchase——

Mr. JONES: We object to getting into the record what the court has already excluded.
The COURT: This last part about the contract of purchase—the objection may be sustained.

A. Orson Loveland occupied either 21 or 22 acres laying right here. Mrs. Babcock occupied this portion here as far as the railroad. This was the piece occupied by Loveland. Orson Loveland lived there where it is marked "O. E. Loveland" of these quarters which are printed on this map "Louisa Babcock"—the north half of that 64 acres.

(Identified herein as map.)

Q. The north half of those two quarters?
A. No, because 64 acres doesn't include these two forties. There is some south of that.
Q. Who occupied that south of the red line?
A. Carl Loveland, C. C. Loveland.
Q. Who is now dead?
A. Yes; also the son of Chester Loveland.
Q. I'll ask you to state if Orson Loveland occupied that portion of these two quarters which is marked "Luoisa Babcock" which lies north of the red lines, and the extension there in lead pencil on the map?
A. Yes.
Q. And that C. C. Loveland or Carl Loveland occupied that portion of those two forties which lies south of the red line continued by the dotted lines to the west?

A. Yes. He also occupied the other lands south of that.

The COURT: Is that part of the premises in dispute?

Mr. JOHNSON: Part of the forties.

57 The COURT: Part of the technical description?

Mr. JOHNSON: Not any part of that particular description, because she isn't claiming to own that, and we don't seek to eject her from something she doesn't claim to own.

Q. When was it that Orson Loveland occupied this land which we have just referred to as being on the north of these forties, or the north strip in these forties?

A. My first knowledge was called to that was after the contract that I spoke of.

Q. Give us the date, about when?

A. About 1889.

Q. When was it that Carl Loveland was occupying this land that lies south or on the southern edge or line of these two forties?

A. Well, about the same time.

Q. Will you state what relation Carl Loveland and Orson Loveland is to Mrs. Babcock?

A. Well, their father is Mrs. Babcock's husband.

Q. Except these two forties that we have referred to here and the two forties lying immediately south as referring to that which Carl Loveland was occupying, what if any other land in this section was at any time occupied by the Lovelands, or either of them?

A. The south of the southwest, and the southwest of the southeast was occupied, and purchased by A. E. Snow, the son-in-law, at that time of Carl Loveland.

B. H. JONES: I make the general objection to it, even if they would attempt to show a declaration at the date stated by Mr. Tarpey of this woman herself that this was railroad land it would be immaterial, because her title began to run in 1875 and was perfect in 1880.

The COURT: There isn't any question before the court.

Mr. JOHNSON: I renew my offer of the application filed with the railroad company bearing date July 1st, 1876, by Anson

58 Loveland, and covering the land in dispute here.

B. H. JONES: I make the same objection; not in any way connected with the defendant.

The COURT: Unless you can show that she authorized it, she ought not to be bound by the act of some third party. Suppose he pretended to represent her?

Mr. JOHNSON: I don't believe he did pretend to represent her.

The COURT: She ought not to be bound by the statement of application he makes for her land. Objection sustained. Exception noted.

(A copy of which application is attached hereto and marked Plaintiff's Exhibit "A" for identification.)

Q. Have you any other document, application of Anson Loveland——

Mr. JOHNSON: For the purpose of showing the people who settled upon this section 17 knew or understood it was railroad land, and that it was subject to purchase. I now offer in evidence the application of Orson C. Loveland bearing date July 1st, 1876, for the purchase of other land than those described in the complaint.

B. H. JONES: Same objection.

Mr. JOHNSON: Anson's covers the land in dispute. Orson's does not.

The COURT: Anson's is excluded. Objection sustained. Exception noted.

(A copy of which application is attached hereto and marked "Plaintiff's Ex. B" for, identification.)

Q. What other, if any, documents have you relating to this property, this land?

A. A contract of sale dated April 17th——

B. H. JONES: I object to a statement of facts.

Mr. JOHNSON: Where was that contract made, any by whom?

A. It was made in Salt Lake.

Q. With you?

A. Yes, sir.

Q. And you represented whom?

59 A. I represented myself in that contract, as the successor in interest of the railroad company. The parties of the other part are C. C. Loveland and Snow——

The COURT: The document will speak for itself who the parties are.

Q. Will you state who these parties said they represented in making this contract?

B. H. JONES: I object to that. They cannot bind this woman by any such statement as that; hearsay evidence.

The COURT: Objection sustained.

Q. Will you state when this contract was made, and how it was made?

B. H. JONES: We object as incompetent, irrelevant and immaterial.

The COURT: Objection overruled. Exception noted.

A. The contract was agreed to in Ogden some time before it was executed, between myself and——

B. H. JONES: I object to who the parties were.

The COURT: You can't prove agency by the declaration of the agent. If that is all, the objection may be sustained.

Q. Then there was an agreement made and entered into in Ogden and subsequently it was consummated by this contract being entered into in Salt Lake?

A. Yes sir.

Q. I will ask you to state if at the time this contract was made and entered into, Mr. Carl Loveland, A. E. Snow, Orson Loveland, stated to you that they or either of them represented all the persons who were then occupying these premises which are set out in this contract?

B. H. JONES: I make the same objection.
The COURT: Objection sustained. Exception noted.

Q. State what was said by them or either of them in that respect?

B. H. JONES: I object to that on the same ground.
60 The COURT: Objection sustained.

Q. Did you ever have any conversation with Mrs. Babcock?
A. I did.
Q. When and where?
A. It's about three years ago, on the land in dispute, at the house she was living in.
Q. Who was with you?
A. Mr. Chase; E. R. Chase.
Q. State fully to the court and jury what that conversation was?

B. H. JONES: I object to it.
The COURT: Objection overruled. Exception noted.

Q. Give the conversation, Mr. Tarpey.
A. We stopped at the house and the contract that you introduced there had lapsed; and we stopped at the house to see Mrs. Babcock about what interest she had in the matter. We explained to her the situation that the contract hadn't been fulfilled and that the land had reverted. She expressed a great deal of surprise and said that Orson Loveland had agreed to purchase that land for her, to pay for the 64 acres and give her 32 acres. I told her that Mr. Loveland hadn't lived up to his contract. He had made two or three payments on it, and then refused to pay any more, and I advised her she better see him and get him to make arrangements to complete the contract as far as her place was concerned.
Q. You say that she said he had agreed to buy and pay for 32 acres. What else, if anything, was said about the 64 acres that is in controversy?
A. She said that under her agreement with Orson Loveland that he was to pay for the 64 acres that's now here in controversy under that contract and he was when the payments were made in full, he was to deed her the south 31 acres.
61 Q. And does that include where her residence is?
A. Yes sir.
Q. Did you have this contract with you?
A. I don't think I did.
Q. State what you told her about the contract?
A. I told her the contents of the contract, and explained to her—she knew more about the contract than I did.
Q. Tell us what she said about the contract?
A. I told her that Mr. Orson Loveland had agreed to buy the

north half of the northwest quarter; that Mr. Carl Loveland had agreed to buy the southwest of the northwest, the southeast of the northwest, northeast of the southwest and the northwest of the southeast, which were the four forties right in the center of the section. The Carl Loveland contract called for that forty and that and that and that, making the four right in the center of the section, a portion of the land in controversy. This was the Orson Loveland 80 and this the A. E. Snow 80.

Q. You explained that to her?

A. Yes.

Q. What did she say about the contract?

A. Then she said that wasn't the way she understood it, that the agreement between her and Carl and her and Orson was that Orson was to pay for this 64 acres that was included in the Carl contract, and that was the first I knew of her agreement with either Carl or Orson.

Mr. JOHNSON: I renew my offer of this contract.

B. H. JONES: I make the same objection.

The COURT: That was the contract you were speaking to her about?

A. Yes, I explained the contract to her, and explained to her the forties each one was claiming, and it was then she told me she was to get 64 acres out of the land that was going to Carl by
62 Orson paying for it. He was to pay for 64 and give her 32, and she said she didn't think he was treating her right; that he had agreed to give her the 64, but they had come to some amicable understanding, and she had agreed to take 32 and he 32, and he to pay for the 64, but she complained bitterly about the fact they hadn't kept their contract, and left her in the position she was.

Mr. JONES: I object on the ground that it is clearly within the statute of frauds.

The COURT: The objection is overruled. The paper may be admitted.

Paper received in evidence and marked "Pl'ff's Ex. 3."

Cross-examination by Mr. JONES:

A. The Central Pacific Railroad Company issued circulars long before I came to the Territory; didn't get a circular at the time I got the other papers, because I didn't think it necessary, matter of such common knowledge, notoriety and history; don't know how many times the lands had been graded; lands in this country belonging to the company were first graded at from two and a half to five dollars an acre; afterwards as land increased in value they raised the grade; at that time the company made a distinction between patented and unpatented lands; that was after the- came and sold all those patented lands on that list; everybody that had a filing on lands covered by that list were notified to appear either at Logan, here, or Ogden; Mr. Mills with a corps of assistants were in

this county and Logan and Ogden some time in the neighborhood of a week at a time.

Q. When did you first go upon the lands in dispute?

A. I think it was in 1885.

Q. After 1885 what year was it you were up there the second time?

A. Oh, I was up there right along. Whenever I'd come here and had any business to call me up there. I think I went up
63 there first on this land in 1885, with Carl Loveland.

Q. At the date of its deed you were the manager of the Toltec Ranch Co.?

A. I was.

Q. At that time you know that Louisa Babcock was in possession of the land?

A. There was a house there; but that matter had all been settled between me and Carl Loveland, Orson Loveland and myself, and I wasn't supposed to inquire who was there or anything else. That thing had all been agreed on between us.

Redirect by Mr. JOHNSON:

A. I told Mrs. Babcock the price of the land was $12.50 an acre. She began to question me and ask me how many payments were made. I told her I thought there were three or four, I didn't know which, and I told her she could continue, and carry out that contract as far as her individual land was concerned. There was no desire or disposition or inclination to take any advantage of her, or on account of the failure of the other people to purchase the land, and she could go on and fulfill the contract, and it would be all right, and the payments Orson Loveland had made on that land was to apply on the purchase price of the land and be deducted, and she could pay the balance.

64 E. R. CHASE recalled, testified as follows:

Examined by Mr. JOHNSON:

Q. Mr. Chase, did you accompany Mr. Tarpey on a visit some years ago to Mrs. Babcock, the defendant in this action?

A. I have been there with him within two or three years. I don't know but more than once.

Q. Do you remember how long ago that was?

A. I should think about two years ago. I don't remember the time exactly.

Q. Did you have a conversation or hear a conversation that took place between Mrs. Babcock and Mr. Tarpey?

A. I did.

Q. Will you state to the jury what was said there at that time between the parties?

A. Yes, I'll have to preface it. We went up there to ascertain on what condition she was holding the land. I was attorney for Mr. Tarpey in this matter. Had quite a talk with her, substantially as

related by Mr. Tarpey today. He asked her what title she had, and she said—I think she said Jones told her she could hold it by reason of being on it so long. If not then, subsequently when I was there; and she further said she ought to have it; that they had paid nearly what it was worth. I think she said $420 had been paid for the two pieces of land, the 64 acres, 32 in each piece. What Orson had paid and what Carl had paid, and Carl and Orson hadn't used her right by forfeiting it before Carl died. This was after Carl's death.

Q. What did she say about any contract between her and Orson or Carl?

A. She didn't say anything, only that was her agreement, they would pay for it and let her have that that she lived on.

Q. Do you remember what she said about the contract that existed between Mr. Tarpey—the contract that was introduced in evidence?

65 A. I don't remember her saying anything about it.

Q. Who was it rather that was to pay for the land?

A. Orson, O. C. Loveland was to pay Carl the same rate that Carl paid for the tract, and that he had paid several payments. When Carl threw up the contract that left Orson out.

Q. Who was this contract with?

A. I understood from her and others that the contract agreement, on the part of Orson that he would pay the same rate.

Q. Pay whom?

A. Pay Carl. The same rate Carl was paying——

Q. Who was Carl paying?

A. He was paying it to the company from whom he bought, the Toltec Company. I presented the contract to him and urged payment several times.

Q. Is Orson here now?

A. He was yesterday, in court.

Q. Mrs. Babcock has been here present during the whole trial?

A. I think so.

66 Cross-examination.

Examined by B. H. JONES:

Q. Who spoke first?

A. I think I said good morning, Mrs. Babcock.

Q. You asked her what claim she had to the land?

A. I don't think it was asked in that direct way.

Q. She replied that her claim was that of adverse possession and Jones had told her——

A. She said Jones said she could hold it if she had been there 20 years.

Q. If she had been there 20 years——

A. She told me so subsequently.

Q. Then Mr. Tarpey offered to sell it to her?

A. That didn't come in sequence. We talked about how hard it was for to leave that land after having raised a family there. She said she ought to have it because it had been pretty near paid for.

I think she said Orson had paid $420 to Carl on the two places. She'll recollect about it.

Q. Tarpey made the proposition to her to sell it to her for $12.50 an acre?

A. Mr. Tarpey then said this: I think he did, pretty sure of it, I know he made the proposition, that if she would take it and pay the interest, pay what Carl was to pay, with what Carl had paid, she should have the 32 acres.

Q. Did she accept the proposition and pay the $12.50?

A. No; she said if she did pay it would be an acknowledgment of our title, and you said she could get it without acknowledging our title.

Plaintiff rests.

67 LOUISA BABCOCK called on behalf of defendant and intervener, being first duly sworn, testified, as follows:

Examined by B. H. JONES:

Q. You may state to the court and jury what if any conversation took place between you and Mr. Tarpey and Mr. Chase about two years ago, about this land, state what the conversation was?

A. Well, I don't know as I can just state the conversation but I know there was no such proposition made to me as Mr. Tarpey made a statement this morning——

B. H. JONES: Tell what was said.

A. My memory is so poor, I don't know as I could tell.

Q. Tell us as near as you can. Was there any contract exhibited to you?

A. No contract whatever.

Q. What did you say in regard to Orson?

A. Well, Orson he had offered, or asked me if I would take 31 acres provided he'd take the 62 and let me have the 31. I told him I claimed the 64 acres; always had done.

Q. That's what you told Mr. Tarpey and Mr. Chase?

A. Yes, as far as my knowledge goes.

Q. You told Mr. Tarpey and Chase that Orson had come and offered to take 31 of your 64 and get you the title to the other 31.

A. Yes, sir; and I would not——

Q. You repeat what you said in regard to that.

A. I don't know as I can exactly. Been two years ago, and my memory is very poor.

Q. You say that Mr. Tarpey did not exhibit any contract to you?

A. I do, not to my knowledge. I never had no contract mentioned.

Q. You say a statement of Mr. Tarpey that you told him that you had agreed with Mr. Loveland is untrue? That you had agreed with Orson?

A. Yes, sir.

68 Cross-examination.

Examined by Mr. JOHNSON:

Q. You say your memory is quite bad?

A. Yes, my memory is poor.

Q. When was it they were over there, or Mr. Tarpey was over there?

A. Somewhere I guess within two years, I don't just remember.

Q. What time of day was it when they were there?

A. They were there several times to see me. This time they did see me was early in the morning, I believe, or between morning and noon.

Q. How many times did he ever come over there to see you except that time?

A. Once.

Q. Just that one time?

A. Once since then. That was the first time. He's been there several times, but I haven't seen him.

Q. When was it that you have seen him there since?

A. I believe a year ago this last April.

Q. How many times have you seen and talked this matter over with Mr. Chase?

A. Two or three times, I guess.

Q. Since the first time when Mr. Tarpey and Mr. Chase came over?

A. Mr. Chase has been there to my house.

Q. Since the time he and Mr. Tarpey came over?

A. Yes.

Q. How many times?

A. Two or three times, I should judge.

Q. You've talked this matter over with Mr. Chase several times?

A. Yes, sir. He's come and talked several times, but the first time I recollect he came there, he was talking to my son about renting the place, and I says to my daughter, I says, I wish Mr. Chase would come in but he started out, and I went and says, How do you do?

69 Q. Was that the time Mr. Tarpey was there?

A. No sir.

Q. When Mr. Tarpey came there and Mr. Chase what was the first thing that was said?

A. I couldn't tell you.

Q. Did they come into the house?

A. No, sir, I went out to the fence to them. I was to the neighbors. I was there doing a washing.

Q. What was the first thing that was said when you got out to the fence?

A. I believe he said good morning.

Q. Then what did you say?

A. Probably I said good morning.

Q. What was the next thing that was said?

A. I couldn't tell you what was said.

Q. How did you know what they were over there for?
A. I'd heard several times that they wished to see me.
Q. Didn't they commence by telling you what they came over for?
A. Yes, sir, they claimed the land.
Q. Mr. Tarpey told you he came over to see about the land?
A. Something to that effect.
Q. He told you too, did he not, that Carl and Orson had forfeited their contract, and had failed to make the payments that they had agreed to?
A. About Carl's, I don't know anything about Carl's.
Q. Orson's.
A. Yes, I guess it's Orson's.
Q. He said that Orson had failed to make the payments agreed upon and it was in default, do you remember that? Do you remember that when he said that you said you were sorry, and that Orson had agreed that he would see that you got that place, and it had been paid for?
A. I don't believe I said anything of the sprt.
Q. Do you remember that he said there had been about $900 paid on the contract?
70 A. No, sir; I don't remember that was said. I don't know there was any contract. Never was any contract on my part; no agreement; no nothing.
Q. Wasn't that said?
A. There's no contract ever mentioned in my presence.
Q. Wasn't it said by Mr. Tarpey that he was perfectly willing you could go on and pay the balance that would be due to get that land?
A. No, sir.
Q. And you said that you would see about it?
A. Never was no such proposition made to me.
Q. What proposition was made to you?
A. I couldn't exactly tell. They claimed the land, or tried to.
Q. Was that all they did. They came there and said this is our land, and told you to get off?
A. Mr. Chase ordered me off several times.
Q. At that conversation what did they say to you?
A. I couldn't exactly tell.
Q. Tell me anyway, whether exactly or not.
A. Of course Mr. Tarpey commenced talking about the land. I don't know as I could tell.
Q. Do you know what was said. Can you remember what was said?
A. No, sir; I can't remember what I said myself at the time.
Q. If you can't remember what was said in this conversation why do you swear Mr. Tarpey didn't——
A. I said there was no proposition made to me.
Q. How do you know when you don't know what was said?
A. I know that wasn't said. I got no knowledge of any proposition made to me.
Q. As a matter of fact you know that Orson Loveland and Carl

and those people had gone down there and made this contract with Mr. Tarpey?

71 A. I did not; I deny it.

Q. You knew that they were going to pay for that land and were paying for it?

A. I didn't know they were paying for it.

Q. Did they never tell you?

A. No, sir they never told me they were paying for the land.

Q. What did they tell you?

B. H. JONES: That's not proper cross-examination.

The COURT: Objection overruled.

Exception noted.

Q. How close did you live to Orson?

A. It isn't but a little way. Not but a little distance.

Q. As far as cross the street in Brigham City?

A. Farther than that.

Q. How much?

A. As far again, I suppose.

Q. Visit back and forth?

A. Have done frequently.

Q. Have done ever since 1889?

A. Yes, sir; right along.

Q. Friendly?

A. Yes, sir; we are relations and——

Q. Been on good terms?

A. Yes sir.

Q. Right along?

A. I think so.

Q. You and your children have visited over there at his house and he and his folks have visited over at your house?

B. H. JONES: I object as not proper cross-examination, immaterial, irrelevant and incompetent.

The COURT: Objection overruled.

Exception noted.

Q. And he has lived there with his family a great many years?

A. Yes sir.

72 Q. About as long as you have lived there?

A. No, sir; he was a boy. He wasn't married when I moved there.

Q. He was just a boy at that time?

A. Yes sir; working for his father.

Q. When did Mr. Chester Loveland die?

A. Been dead fourteen years the 5th of this last March.

Q. Where were you born?

A. I was born in England.

Q. When did you come to this country?

A. '68.

Q. How old was you when you came here?

A. I was 20.

ve you ever been naturalized?
supposed I was naturalized when I married Mr. Loveland.
You were his plural wife?
Yes sir.
Q. Did Carl ever live on there?
A. Not to my knowledge. He lived over in this next house. He didn't live there. He would come there frequently.
Q. He had some land over there?
A. Yes sir.
Q. Whereabouts was his land?
A. South of my place.
Q. Right next to it?
A. Yes sir; joining. Partition fence is where he put it up between Carlos and myself.
Q. Whereabouts is Mr. Orson Loveland's land?
A. It's on the north.
Q. Right north of you?
A. Yes sir.
Q. Do you know how they got their land?
A. No sir; I don't know anything about it.
73 Q. You don't know how they got their land?
A. No, sir; I don't.
Q. You never bought this land?
A. No, sir.
Q. You never gave anything for it?
A. 25 years ago my husband gave it to me as my home. I have made that my home, and I have lived there ever since.
Q. He built the house?
A. Yes sir, he built the house. There was another house on the slough I lived in the first summer. The next year Mr. Loveland built this house, just a little east from where the other one was.
Q. He built the house and you went to live over there. He lived over the- a good deal of the time?
A. No, sir; not a good deal of the time. He was there part of the time.
Q. There used to be a fence, didn't there, between you and Orson, different from where it is now?
A. Yes sir.
Q. Where was that fence?
A. About half way from where it is now.
Q. When was that fence move ?
A. Just about the time Mr. Tarpey was at my place, a year probably, two or three something.
Q. Who used that land prior to the moving of the fence?
A. Orson Loveland part of the time.
Q. Used it all the time, didn't he?
A. No sir.
Q. He did use it part of the time.
A. Yes sir.
Q. What part of the time?

A. Some four years, I believe, if my memory serves me right. I don't just remember.

74 Q. During that time it was considered his land?

A. No, sir; not to my knowledge.

Q. He didn't pay you any rent for it?

A. No, sir.

Q. He was to have that land in consideration of paying for all of it, wasn't that right?

A. If that was his agreement, himself, it wasn't my agreement.

Q. Didn't you understand he was to pay for all that land and you was to get half of it?

A. I never acknowledge- such a right.

Q. You knew about it?

A. What Orson Loveland and Carlos done they done without my consent, or knowledge.

Q. Who told you to answer that way, Mr. Jones?

A. No, sir.

Q. When did Mr. Jones first tell you you might be able to hold this land by adverse possession?

A. Not when Mr. Chase said it, by any manner of means.

Q. When was it?

A. I haven't said Mr. Jones said I could hold that land.

Q. He didn't tell you that, whether you've said it or not. Don't you want to answer that?

B. H. JONES: Answer the question he asks you.

A. Repeat the question again.

Q. Mr. Jones told you that?

A. When I employed him for my attorney. I don't know whether he told me I could hold it or not.

Q. When was that?

A. About a year ago, I guess, this fall.

Q. He sent you word before that?

A. No, sir; he did not.

Q. You never got any information from Mr. Jones until about a year ago?

A. Never.

75 Q. When were you married to Mr. Babcock?

A. Coming 11 years ago on the 18th day of June.

Q. He lives over there?

A. He's down with his father on the mine. He makes it his home when he's there with me. He's down to Monie.

Q. You've got some children?

A. Yes sir.

Q. They are all grown.

A. My youngest child is 14 years old the 18th day of last December.

Q. They all live with you?

A. They're all married except this one.

Q. When did you first begin to pay taxes on this land?

A. At my first husband's death, Mr. Loveland.

A. In 1886.

A. It was whenever I was assessed, I paid the taxes.

Q. Now, then, you say, do you, that all these years, notwithstanding you and Orson have lived immediate neighbors that he never at any time told you anything about any contracts he had with respect to this land?

A. I told you he came and offered me the 31 acres.

Q. When was that?

A. Well, about the time he took the place.

Q. When was that?

A. I should judge about four years. I don't know exactly.

Q. Four years ago?

A. Yes, sir.

Q. Isn't that about the time Mr. Tarpey went over there to see you?

A. The first time I saw Mr. Tarpey was when I spoke to you about it. About a year or two years, maybe.

Q. Wasn't it about the time this contract was made with Orson and Tarpey and Carl.

A. I don't know for sure.

76 Q. That was in '89. Isn't that the time you had the conversation with Orson about this land.

A. I'm sure I couldn't tell you just exactly.

Q. You can't tell but you did have that talk?

A. I said he came and made me that offer about the 31 acres and I never agreed to take the 31 acres. I claimed this 64 for my home.

Q. Why is — that that fence that separated and divided those two 31 acres stood there until a year or two ago?

A. Because Orson Loveland moved it there.

Q. He finally moved it?

A. He has moved it on the line, yes sir.

Q. Which line do you refer to?

A. On to the south, north of myself. That divided the 31 acres right in two.

Q. It divided the 64?

A. Or the 64, yes sir.

Q. That fence stood there until a year or two ago, did it not?

A. Yes sir.

Q. And it had been there a great many years?

A. No, sir; it had not.

Q. How long had it been there?

A. From the time I tell you about, the best of my recollection serves me right, four or five years.

Q. That Orson put it there?

A. Yes sir.

Q. Why did he put it there, do you know?

A. Because he was working the land, I suppose.

Q. Any other reason?

A. No sir.

Q. He didn't say anything to you about it?

A. No sir; he didn't say anything to me about moving the fence not a word.

77 Q. Who moved it away finally about a year or two ago?

A. My husband, by my permission. I- was in my way and I wanted it moved onto the line because I claimed——

Q. What do you base your claim on?

A. My husband buying it from Mr. Lish and giving it to me as my home.

Q. Have you any deed to it?

A. No, sir; he didn't give me no deed.

Q. Never any administrator of his estate appointed after he died, was there?

A. There certainly was.

Q. Do you undertake to tell us now, Mrs. Babcock, that you didn't know that was railroad land?

A. I never acknowledged and thought, or knew it was railroad land. I always supposed it was Government land ever since I lived there.

Q. You didn't even know that it was railroad land?

A. No sir. I thought it was Government.

Q. You know the land over in that country that hasn't been bought is either Government land or railroad land?

A. Yes sir.

Q. You've known that all these years?

A. Yes, sir; I'd suppose it would be one or the other.

Q. You thought it was Government land?

A. Well, I had an idea it would be finally settled as Government land.

Q. You were holding it as Government land were you?

A. As it was my home, I didn't know what.

Q. Did you homestead it?

A. No, sir.

Q. Pre-empt it?

A. No sir.

Q. Did you attempt to?

A. No, sir.

78 Q. Why didn't you?

A. Because I didn't know it was necessary.

Q. Did you make any inquiry as to how you ought to acquire title to Government land?

A. Well, the land was in dispute.

Q. How was it in dispute?

A. It wasn't settled whether it was Government or railroad. That's my understandin*t* about it.

Q. It was either Government or railroad and you didn't know which?

A. No sir.

Q. When was that dispute existing?

A. Some few years ago, quite a few years ago. I don't remember how long.

Q. Give us your best recollection.

A. It must certainly always have been in dispute. I've understood ever since I have been here. It wasn't decided which it was to my knowledge.

Q. That it wasn't certain whether it belonged to the Government or the railroad?

A. Yes, sir; that's it.

Q. And you knew if it was Government land you would have to enter it or acquire title to it by homestead or pre-emption?

A. Yes sir.

Q. If it was railroad land it was your intention to take it for nothing?

79 B. H. JONES: This witness was simply called for the purpose of an examination on that conversation alone. No understanding that the case would be reopened, and latitude given to counsel that we desire to put a protest against.

The COURT: She might be asked any question that would render more or less probable the answers she made to the conversations she had with Mr. Tarpey and Mr. Chase. Objection sustained.

Exception noted.

Q. Do you remember as a fact that Mr. Loveland, in his lifetime about 1884 attended a meeting of the settlers over in that neighborhood, and in fact all this country round about with a representative of the Central Pacific Railroad Co. here in Brigham to confer about these various lands and to arrange about the price of them from the railroad company?

B. H. JONES: I object as immaterial, irrelevant and incompetent and not proper cross-examination.

The COURT: I don't see that that is proper cross-examination.

Exception noted.

Redirect examination.

Examined by B. H. JONES:

Q. Is Mr. Babcock a citizen of the United States?

A. Yes sir.

Mr. JOHNSON: When were you married?

A. About 11 years the 18th of June.

Defendants rest.

The foregoing, with the exhibits hereto attached, is all the testimony and evidence heard given and considered at the trial of said causes.

79½ *The Court Charges the Jury.*

One of the causes being tried before you is an action of ejectment to recover possession of the following-described premises: Beginning at the northeast corner of the southwest quarter of the northeast quarter of said section 17, township 11, 2, west, and running thence

south 64 rods, more or less to a wire fence, thence west 160 rods, more or less, to the west line of the southeast quarter of the northwest quarter of said section 17, thence north 64 rods to the northwest corner of said southeast quarter of the northwest quarter, thence east 160 rods to the place of beginning; except the right of way of the Oregon Short Line (Railroad Company) across said lands hereinbefore described. The plaintiff, The Toltec Ranch Company alleges its corporate existence on the — day of ——, A. D. —, and that on said day it was the owner and entitled to the possession of said tract of land; that on said day the defendants wrongfully retained possession of said premises, and still continue to withhold the same to the plaintiff's damage in the sum of $—.

Second. The defendants deny each and every allegation of the complaint. The defendants among their defenses plead the action is barred by certain provisions of the statute referred to in their answer, and which are commonly known as the statute of limitations, and which will hereafter in these instructions be more fully explained to you.

There are other allegations and defenses made by the defendants in their answers as to the premises in question having been settled upon, improved and claimed by parties other than the defendants prior to the time when the rights of the railroad company, the predecessor in interest of the plaintiff, attached to the said premises, but as the court has disposed of the questions raised under such defenses against the contentions of the defendants and has stricken from the record testimony offered on such defenses, and all
80 evidence of the occupancy and cultivation and improvements prior to the time the defendant Louisa Babcock went into possession of the said premises, the court instructs you that you have nothing to consider in reference to said defenses.

Third. The court charges you that the record title to the premises in dispute is in the plaintiff herein as evidenced by the patent issued to the Central Pacific Railroad Company, and afterwards deeded to the plaintiff herein.

Fourth. The plaintiff admits in reply to defendants' answers to the plaintiff's complaint filed herein that the said defendant Louisa Babcock and her predecessors in interest have held and occupied the premises exclusively for more than 30 years since the entry upon the land since 1867.

Fifth. Our statutes provide as follows: Section 2858. "No action for the recovery of real property, or for the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within 7 years before the commencement of the action." Section 2860. "No cause of action or defense or counter-claim to an action founded upon the title to real property or to rents or profits out of the same shall be effectual unless it appears that the person prosecuting the action or interposing the defense or counter-claim or under whose title the action is prosecuted or defense or counter-claim is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the property in question within 7 years bef re

the committing of the act in respect to which such action is prosecuted or defense or counter-claim made." Section 2861. "In every action for the recovery of real property or the possession thereof the person establishing the legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person shall be presumed to have been under and in subordination of the legal title unless it appear that the property has been held and possessed adversely to such legal title for a period of 7 years before the commencement of the action."

81 Sixth. The plaintiff must recover on the strength of its own title and not on the weakness of the defendants'. Our statute provides that for the purpose of constituting adverse possession by a person claiming title not founded on a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only: (1.) Where it has been protected by a substantial enclosure. (2.) Where it has been usually cultivated or improved. (3.) Where labor and money has been expended upon dams, canals, embankments, acqueducts, or otherwise, for the purpose of irrigating said lands, amounting to the sum of $5.00 per acre. Provided, however, that in no case shall adverse possession be established under the provisions of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for the period of 7 years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes territorial, county or municipal which have been levied and assessed upon such land according to law.

Seventh. It is not essential that a party who takes possession of lands and holds adversely to the owner should enter under a deed or other written title to cause the limitation of seven years to run in his favor.

Eighth. I instruct you that the defendant Louisa Babcock cannot tack her possession or adverse claim if any, to the premises in controversy under the evidence, to the possession or adverse claim, if any, of her predecessor or predecessors if any such there were.

Ninth. The court instructs you that prior to the year 1884 the statutory period for adverse possession was five years instead of seven years, and the person possessing adversely was not required to show that he had paid taxes assessed upon the same.

Tenth. The possession of the occupant must be in derogation of the title of the true owner. Claim of ownership is necessary, and the occupant must claim to be the absolute owner of the property in order to constitute title by adverse possession. Occupancy of land by permission or sufferance of the owner would not constitute an adverse possession.

82 Eleventh. The other suit which is being tried before you is in claim and delivery for the recovery of the following goods and chattels: Two stacks of hay, nine sacks of alfalfa seed. The plaintiff alleges in its complaint, that on the — day of ——, 1899, in Deweyville, Box Elder county, the plaintiff, Toltec Ranch Company was the owner of said hay and alfalfa seed of the value of

$200.00; that the defendant on the 9th day of ——, at Deweyville, county of Box Elder, without plaintiff's consent and wrongfully took said goods and chattels from the possession of said plaintiff, that at the commencement of the suit on the 30th day of September, 1899 the plaintiff demanded from the said defendants the said goods and chattels; that the defendants still unlawfully withhold and detain the said goods and chattels from the possession of the plaintiff, to the damage of the plaintiff in the sum of $200.00.

Twelfth. The defendants deny each and every allegation in the said complaint contained, and further in brief allege the same grounds of defense that are alleged by the defendants in their answers to the other suit as heretofore explained to you. The court instructs you that the title to the hay and seed in question would follow the ownership of the land from which the same was taken at the time thereof. If you find the issues joined in the other suit in favor of the plaintiff then you would also find the ownership to the personal property to be in the plaintiff; but, on the other hand, if you find the issues joined in the other suit, the suit in ejectment for the recovery of the land, in favor of the defendants, then you will also find for the defendants in the present cause of action.

Thirteenth. The burden of proof is upon the defendant- to make out their defense of adverse possession by a preponderance of the evidence.

Fourteenth. By a preponderance of the evidence is meant the greater weight of the evidence; that which is more convincing as to its truth. It is not necessarily determined by the number of
83 witnesses for or against a proposition, although all other things being equal it may be so determined. If you find a conflict in the evidence, you should reconcile if you can, upon any reasonable theory. If you cannot do so, then you must determine what you believe.

Fifteenth. The court charges you that the instructions should be construed together and as a whole. Each instruction should be read and understood with reference to and as a part of the entire charge, and not as though each instruction was intended to present the whole law of the case.

Sixteenth. You are the sole judges of the weight of the evidence, and of the facts, and of the credibility of the witnesses. You are instructed that three-fourths of your number concurring you may find a verdict in these cases. Upon retiring, you will select a foreman, and if all of you agree upon a verdict your foreman will sign the same. If three-fourths of your number and less than the whole agree upon a verdict, those agreeing upon the same will sign the verdict agreed upon.

Mr. JOHNSON: The plaintiff excepts to the sixth instruction given by the court, and each and every part thereof, for the reason that said instruction fails to give all the elements required to be proven to make up a defense based upon adverse possession and the statute of limitations.

Plaintiff excepts to instruction numbered seven, and every portion thereof.

Plaintiff further excepts to the giving of instruction numbered ninth, and each and every part thereof on the ground that the same has no application to the facts proven in this case, and is misleading.

Plaintiff excepts to refusal of the court to give first request for instruction of plaintiff.

Plaintiff's Request No. 1.

I instruct you, gentlemen of the jury, to return a verdict in favor of the plaintiff and against the defendants, in each of the actions on trial, and being heard together by stipulation of the parties.

Refused.

HART, *Judge.*

Thereafter the jury returned a verdict in each of said causes in favor of the defendants, and against the plaintiff: "No cause of action."

84 PLAINTIFF'S EXHIBIT 1.

Deed No. 1957 G, new series.

To all whom these presents shall come:

The Central Pacific Railroad Company, a corporation existing under the laws of the State of California and of the United States, and the Metropolitan Trust Company of the City of New York, a corporation, existing under the laws of the State of New York, trustees under the indenture of mortgage or deed of trust from the said Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, trustees, dated 1st October 1870, and trustee- under the indenture dated 4th September, 1890 between the said Central Pacific Railroad Company, J. O. B. Gunn, and William E. Brown, heretofore trustees under said indenture of mortgage or deed of trust of 1st October, 1870, and the Southern Pacific Company, in respect to the extension of bonds, secured by the said indenture of mortgage or deed of trust of 1st October, 1870, send greeting:

Whereas, in and by said indenture of mortgage or deed of trust of 1st October, 1870, it was provided that all of the lands therein conveyed and mortgaged should be under the sole and exclusive management and control of the said Central Pacific Railroad Company with full power and authority in it to make contracts for the sale of the same, at such price, on such credit or terms of payment and upon such other conditions as should be agreed to by the parties of the first and second part- to the said indenture of mortgage or deed of trust, and as should seem to the said parties best calculated

to secure a payment in full of all the bonds issued as therein provided until entry of foreclosure by the trustees as therein provided; and whereas the said Central Pacific Railroad Company has contracted for the sale of all right, title and in-
85 terest that it now has and may hereafter acquire from the Government of the United States in and to the land hereinafter described to Toltec Ranch Company, a corporation for the sum of eight hundred and twenty dollars, and such contract for the sale of same, at the price and upon the credit or terms of payment and conditions contracted for, has been agreed to by the Central Pacific Railroad Company and Metropolitan Trust Company of New York, to which companies it has seemed best calculated to secure the payment in full of all the bonds issued, as in said indenture of mortgage or deed of trust provided; and whereas the whole of the purchase-money of said land has been paid to the Metropolitan Trust Company of the City of New York, in cash or in bonds secured by the said indenture of mortgage or deed of trust or in overdue coupons:

Now therefore, in consideration of the premises, and the said sum of eight hundred and twenty (820) dollars, the receipt whereof in cash, or in such bonds or coupons is hereby acknowledged the said Central Pacific Railroad Company, and the said Metropolitan Trust Company of the City of New York, trustees upon the trusts expressed in the indenture hereinbefore mentioned, do assign, transfer and set over to the said Toltec Ranch Company and its successors and assigns all right, title and interest that the said companies now have or may hereafter acquire from the Government of the United States in and to the following-described tracts of land, situate, lying and being in the county of Box Elder, State of Utah, to wit: the southwest quarter (S.W. ¼) of section nineteen (19) in township nine (9), north range one (1) west; fractional west half (frt. W. ½) of section five (5) in township ten (10) north range two (2) west; southwest quarter of northeast quarter (S.W. ¼ of N.E. ¼) north half of northwest quarter (N. ½ of N.W. ¼) southeast quarter of northwest quarter (S. E. ¼ of N.W. ¼) east half of southwest quarter (E. ½ of S.W. ¼) and west half
86 of southeast quarter (W. ½ of S. E. ¼) of section seventeen (17) in township eleven (11) north range two (2) west; lots one (1) four (4) five (5) six (6) seven (7) and eight (8) and the southeast quarter (S. E. ¼) of section thirty-one (31) in township eleven (11) north of range two (2) west, Salt Lake base and meridian, containing one thousand, one hundred and seventy 93/100 (1170.93) acres, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging.

In witness whereof each of the parties hereto have caused these presents to be signed by its president or vice-president, to be sealed

with its corporate seal, and such seal to be attested by its secretary or assistant secretary, this fourth (4th) day of November, 1897.

ISAAC L. REQUA,
President C. P. R. R. Co.

Attest: W. M. THOMPSON,
[SEAL.] *Secretary C. P. R. R. Co.*

Witness:
GEO. CUTHBERT.

CHAS. M. JESUP,
2nd Vice-President Metropolitan Trust Co.

Attest: BEVERLY CHEW.
[SEAL.] *Secretary Metropolitan Trust Company.*

Witness:
JOHN TELFORD.

87 STATE of CALIFORNIA, } ss:
City and County of San Francisco, }

On this 4th day of November, 1897, before me, Benj. F. Tuttle, a commissioner of deeds for the State of Utah, to reside in the State of California, duly appointed, commissioned and qualified, and residing in the city and county of San Francisco, in the State of California, personally appeared Isaac L. Requa, personally known to me to be the president of the Central Pacific Railroad Company, the corporation that executed the foregoing instrument, and to be the person who subscribed the same as such officer; and also personally appeared W. M. Thompson, person-lly known to me to be the secretary of the said corporation, and to be the person who subscribed the said instrument as such officer, and each acknowledged to me that the said corporation, and as such officer thereof, executed the foregoing instrument freely and voluntarily, and for the uses and purposes therein mentioned. And I further certify that I know the seal affixed to the said instrument to be the corporate seal of the said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[SEAL.] BENJ. F. TUTTLE,
A Commissioner of Deeds for the State of Utah, Residing in the City and County of San Francisco, State of California.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this eighteenth day of November, in the year eighteen hundred and ninety-seven before me Geo. E. Miles, a commissioner of deeds for the State of Utah, in and for the State of New York, resident in the city of Brooklyn, personally appeared Charles M.
88 Jesup and Beverly Chew, personally known to me to be the second vice-president and secretary, respectively, of the Met-

ropolitan Trust Company, one of the corporations described in and that executed the within and annexed instrument, and they each acknowledged to me that such corporation executed the same; and the said Charles M. Jesup and Beverly Chew, second vice-president and secretary, respectively as aforesaid, being personally known to me to be such officers of said trust company, and the individuals described in and who executed said instrument as such officers of said trust company, each severally and personally then and there further acknowledged to me that the seal affixed to said instrument at the signature of said trust company is the corporate seal of said trust company, and that is was so affixed and attested and said instrument executed by them in pursuance of authority of the board of trustees of said trust company, as the free and voluntary act and deed of said trust company and of themselves, and each of them as its said respective officers, freely and voluntarily, and for the uses and purposes therein mentioned and set forth.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first in this certificate last above written.

GEO. E. MILES,
Commissioner of Deeds for the State of Utah in and for the State of New York, Resident in the City of Brooklyn.

Endorsed on back: Deed No. 1957 G, new series. Central Pacific Railroad Co. and the Metropolitan Trust Company of the City of New York to Toltec Ranch Company. Deed. Dated 4th November, 1897. State of Utah, county of Box Elder, *ss.* Filed for record and recorded June 1st, 1898, at 2 o'clock p. m., in Book R of Deeds, page 194. Ameilia Graehl, county recorder.

89 The United States of America to all — whom these presents shall come, Greeting:

Whereas, by act of Congress approved July 1st, 1862, as amended by the act of July 2nd, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal, military and other purposes, and the act of July 3rd, 1886, authority is given to the Central Pacific Railroad Company to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said acts and provision is made for granting to the said company every alternate section of public land designated by odd numbers to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof and within the limits of twenty miles on each side of said road not sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not attach at the time the line of said road is definitely fixed. And whereas an official statement bearing date November 3rd 1869 from the Secretary of the Interior has been filed in this office showing that the line of said railroad and telegraph from Ogden in the Territory of Utah, to Sacramento city State of

California has been constructed and fully completed and equipped in the manner prescribed by the acts aforesaid; and whereas certain tracts of land in the State of Utah have been listed under the acts aforesaid by the duly authorized land agent of said Central Pacific Railroad Company as shown by his original lists approved by the local land officers and on file in this office; and whereas the said tracts of land lie coterminous to the constructed line of said road and are particularly described as follows, to wit: The southwest quarter of the northwest quarter and the southeast quarter of the northwest quarter and the west half of the southeast quarter and the east half of the southwest quarter of section seventeen in
90 township eleven, north of range two west Salt Lake meridian, containing two hundred and forty acres.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant unto the said Central Pacific Railroad Company, and to its assigns the tracts of land listed as aforesaid and described in the foregoing yet excluding and excepting from the transfer by these presents "all mineral lands" should any such be found to exist in the tracts described in the foregoing but this exclusion and exception according to the terms of the statute "shall not be construed to include coal and iron lands."

To have and to hold said tracts with the appurtenances thereof unto the said Central Pacific Railroad Company, and to its successors and assigns—

In testimony whereof, I Grover Cleveland, President of the United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this the fifth day of September in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and twenty-first.

By the President:

[SEAL.] GROVER CLEVELAND.
M. M. McKEAN, *Secretary.*

E. F. BEST,
Assistant Commissioner General Land Office and Recorder ad Interim.

Recorded vol. 20 page 442 to 460 inclusive.

91 PLAINTIFF'S EX. 2.

Articles of Incorporation of the Toltec Ranch Company.

Know all men by these presents: that we, the undersigned a majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California. And we hereby certify;

First. That the name of said corporation shall be the Toltec Ranch Company.

Second. That the purposes for which it is formed are to carry on the business of buying, owning, holding, leasing, hiring, contracting for, selling, mortgaging, hypothecating, trading, trafficking, managing and generally dealing in land and live stock, also for the purpose of carrying on a general merchandise and mining business in the United States of America, Republic of Mexico and Dominion of Canada.

Third. That the place where the principal business of said corporation is to be transacted is the city and county of San Francisco, State of California.

Fourth. That the term for which said corporation is to exist is twenty-five years from and after the date of its incorporation.

Fifth. That the number of directors or trustees of said corporation shall be five, and that the names and residences of the directors or trustees who are appointed for the first year and to serve until the election and qualification of such officers, are as follows, to wit:

Names.	Whose residence is at San Francisco, California.
F. C. Cleary	"
F. M. Cleary	"
H. S. Krigbaum	"
B. A. Gamble	"
92 D. P. Tarpey	Do.

Sixth. That the amount of the capital stock of said corporation is one hundred thousand dollars and the number of shares into which it is divided is one thousand of one hundred dollars each.

Seventh. That the amount of said capital stock which has been actually subscribed is five hundred dollars and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of subscribers.	No. of shares.	Amount.
F. C. Cleary	One	$100.00
F. M. Cleary	One	100.00
H. S. Krigbaum	One	100.00
B. A. Gamble	One	100.00
D. P. Tarpey	One	100.00

In witness whereof we have hereunto set our hands and seals, this twenty-seventh day of May, A. D. 1896.

F. C. CLEARY. [SEAL.]
F. M. CLEARY. [SEAL.]
H. S. KRIGBAUM. [SEAL.]
B. A. GAMBLE. [SEAL.]
D. P. TARPEY. [SEAL.]

Signed, sealed and delivered in the presence of
HARRY J. LASK.

STATE OF CALIFORIA, } ss:
City and County of San Francisco, }

On this twenty-seventh day of May, in the year one thousand eight hundred and ninety-six, before me Harry J. Lask, a notary public, duly commissioned and sworn, and residing in San Francisco, city and county, personally appeared F. C. Cleary, F. M. Cleary, H. S. Krigbaum, B. A. Gamble and D. P. Tarpey, known to me to be the persons whose names are subscribed to and who executed the within instrument, and acknowledged to me that they executed the same.

93 In witness whereof I have hereunto set my hand and affixed my offixial seal the day and year last above written.

HARRY J. LASK,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, C. F. Curry, county clerk of the city and county of San *San* Francisco, State of California, do hereby certify *that* the within to be a full true and correct copy of the articles of incorporation of the Toltec Ranch Company as remains on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal this 29th day of May, A. D. 1896.

[SEAL.] C. F. CURRY, *Clerk.*

STATE OF CALIFORNIA, }
Department of State. }

I, L. H. Brown, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of articles of incorporation of Toltec Ranch Company with the certified copy of the original now on file in my office and that the same is a correct transcript therefrom, and of the whole thereof; also that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State at office in Sacramento, California, the 9″ day of Feb'y A. D. 1897.

L. H. BROWN,
Secretary of State,
By W. T. SESUON, *Deputy.*

93½ PLAINTIFF'S EX. 3—No. 32.

This agreement, made at Salt Lake City, Utah, this 18th day of December, A. D. 1889, between D. P. Tarpey of Salt Lake party of the first part, and C. C. Loveland, O. C. Loveland and A. E. Snow of Box Elder county, Territory of Utah, parties of the second part:

Witnesseth: That the party of the first part in consideration of the agreements of the parties of second part, herein contained, agrees to sell unto the parties of the second part, the following

tract of land, situate in the county of Box Elder Territory of Utah, to wit:

To A. E. Snow, the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, being eighty acres.

To C. C. Loveland the northeast quarter of the southwest quarter, the northwest quarter of the southeast quarter; the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter, being one hundred and sixty acres.

To O. C. Loveland the north half of the northwest quarter, being eighty acres, all of section No. seventeen, in township eleven, north of range two, west, Salt Lake base and meridian containing three hundred and twenty acres, for the sum of four thousand dollars, in United States gold coin, of which sum the said parties of the second part have paid the sum of four hundred dollars with one year's interest on the remainder of said purchase-money. The remainder of said principal sum amounting to thirty-six hundred dollars in United States gold coin to be paid by the parties of the second part in nine equal annual payments, with interest annually in advance, at the rate of seven per cent. per annum; said payments to be made on the 18th day of each and every December until said principal and interest are fully paid.

94 And the said party of the first part agrees that upon the punctual payment of said purchase-money and interest, and the strict and faithful performance by the parties of the second part, their legal representatives or assigns of all the agreements herein contained, then the party of the first -- will after the receipt of a patent ther-for from the United States, cause to be made and executed to the parties of the second part their heirs and assigns, upon full request and the surrender of this contract, a deed in fee-simple for the conveyance of said premises, reserving all claims of the United States to the same as mineral lands.

And the parties of the second part hereby agree to pay to the said D. P. Tarpey, his heirs or assigns, the said sum of thirty-six hundred dollars in United States gold coin, with interest as aforesaid, annually in advance, at the rate of seven per cent. per annum, at the banking-house of McCornick and Co. Salt Lake City, Utah, on 18th day of December, 1890, '1, '2, '3, '4, '5, '6, '7, and 1898, both principal and interest payable in United States gold coin, and until the full payment of said purchase-money and interest, will permit no strip or waste to be made on said premises, and no wood or growing trees to be cut therefrom, except for necessary fuel for the family, and for the erection of buildings or fences, without the previous written consent of the party of the first part. And if the parties of the second part shall fail to strictly comply with any of the stipulations of this contract, then the party of the first part, its successors or assigns, shall have the right to enter upon and take possession of the said premises with all the improvements thereon.

It is further mutually agrees and understood, that the parties of the second part shall have the immediate possession and enjoyment of said premises, and if the same be in the adverse possession of a

third party, the right to sue at his own cost and charge the same of the party of the first part to recover the same by action.
95´ And that in consideration of such possession and enjoyment, he will pay all taxes and assessments that may be, at any time, imposed upon said premises. And it is further agreed that should the parties of the second part fail to pay such taxes and assessments, or any part thereof, at any time when the same shall become due, the party of the first part may pay the same and add the amount thereof to the price to be paid for said premises, and such taxes or assessments with interest at the rate of seven per cent. per annum shall be paid before said parties of the second part shall be entitled to a conveyance of said premises.

The sum of three dollars to be paid by the purchaser hereof for the expenses of a deed when executed.

Witness the hands and seals of the parties hereto in duplicate this 18th day of December, A. D. 1889.

D. P. TARPEY. [SEAL.]
C. C. LOVELAND. [SEAL.]
A. E. SNOW. [SEAL.]
O. C. LOVELAND. [SEAL.]

Witness:
J. M. COOMBS.

Endorsed on back: No. 32. Contract for a deed. D. P. Tarpey to C. C. and O. C. Loveland *et al.* 9 paym'ts. Dec. 18th.

96 PLAINTIFF'S EXHIBIT A FOR IDENTIFICATION.

Application Central Pacific Railroad Company of California, Land Department.

JULY 1ST, 1876.

The undersigned hereby applies to purchase the northwest quarter and the west half of the northeast quarter section 17, township 11, N. range two in Box Elder county, containing two hundred and forty acres.

Terms: Cash or credit five years.
Residence, Box Elder county, Brigham City, Utah.
Post-office address " " " "

ANSON C. LOVELAND.

Endorsed on back: Salt Lake meridian. No. 23 Application to purchase N. W. ¼ and W ½ of N. E. ¼ sec. 17, T. 11, N. R. two W. by Anson C. Loveland, July 1st, 1876.

97 PLAINTIFF'S EX. B FOR IDENTIFICATION.

Application Central Pacific Railroad Company of California, Land Department.

JULY 1ST, 1876.

The undersigned hereby applies to purchase the southwest quarter and the west half of the southeast quarter of section 17, township 11, N. range two W. in —— county containing two hundred and forty acres.

Terms: Cash or credit of 5 years.
Residence Brigham City, Box Elder county, Utah.
Post-office address " " " "

ORSON C. LOVELAND.

Endorsed on back: Salt Lake meridian. — 6. Application to purchase S. W. ¼ and the W. ½ of S. E. ¼ sec. 17, T. 11, N. R. 2 W. by Orson C. Loveland, July 1st, 1876.

98 DEFENDANTS' EXHIBIT 4.

1889:

Deweyville district. Orson Loveland. Part section 17, tp. 11, N. R. 2 W.

1890:

Orson Loveland. 40 acres in N. E. ¼ section 17, tp. 11 R. W.
Wm. Babcock, part section 17, tp. 11 R.

1891:

Louisa Babcock assessed with 31 acres in N. E. & N. W. ¼ section 17, tp. 11, R. " W.
Elmer Loveland 10 acres in N. W. ¼ section 17 tp. 11 R. " W.
O. C. Loveland, 31 acres in N. E. and N. W. ¼ section 17, tp. 11 N. R. 2 W.
Wm. and Duane Loveland, 20 acres in N. E. sec. 17–11–2.

1892:

Louise Babcock, 31 acres in N. E. ¼ section 17, tp. 11 R. 2 W. page 2 line 2.
R. C. Fryer, E. ½ of N. E. ¼ section 17, tp. 11, R. 2, page 2, line 13.
Frank Loveland, 15 acres in N. W. ¼ 17–11–2, page 5 line 13.
O. C. Loveland, 103½ acres in N. W. 17–11–2, page 5 line- 19–20.
Wm. & Duane Loveland, 20 acres in N. E. ¼ 17–11–2.

1893:

Louise Babcock, 31 acres in N. E. ¼ 17–11–2, page 64, line 15.
Frank Loveland, 15 acres in N. W. ¼ 17–11–2, page 64, line 20.
O. C. Loveland, 143½ acres in N. W. and N. E. ¼ sec. 17–11–2, page 64.

Wm. & Duane Loveland, 20 acres, N. E. ¼ 17, tp. 11–2, page 64, line 22.

R. C. Fryer, E. ½ of N. E. ¼, 80 acres in 17–11–2, page 64, line 23.

1894:

Wm. Loveland, S. W. of N. W. 10⅓ acres in 17–11–2, page 69 line 19.

Louise Babcock, S. W. of N. W. 10⅓ acres in 17–11–2, page 69, line 20.

Frank Loveland, 15 acres in N. W. 17–11–2, page 69, line 26.

O. C. Loveland, N. W. and N. E. 143 acres in 17–11–2, page 69 line- 27, 28.

Wm. & Duane Loveland, 20 acres in N. E. 17–11–2.

99 R. C. Fryer, E. ½ of N. E. ¼ 80 acres, 17–11–2, page 69, line 30.

1895:

Louise Babcock, 31 acres in N. E. 17–11–2, page 74, line 20, page 74–76. A. F. Loveland, 5 acres in N. W. ¼ 17–11–2 74–27 Oliver Loveland, 10 acres in N. W. 17–11–2. 74–28. O. C. Loveland, N. W. ¼ and N. W. 143 acres, 17–11–2.

Wm. & Duane Loveland, 20 acres in N. E. 17–11–2, page 74–30.

R. C. Fryer, 80 acres in E. ½ of N. E. 17–11–2.

1896:

A. E. Snow, S. W. of N. W. 10⅓ acres 17–11–2, page 74, line 18.

A. F. Loveland, 15⅓ in N. W. ¼ 17–11–2.

C. C. Loveland, 90 acres part in N. W. 17–11–2, page 74 line 20

Louise Babcock, 31 acres in N. E. ¼ section 17–11–2 page 74, line 21.

Oliver Loveland, 10 acres in N. W. ¼ 17–11–2, page 74 line 27.

Pg. 74 l. 28 O. C. Loveland, 143 acres in N. E. & N. W. 17–11–2.

74–30 R. C. Fryer, 80 acres in N. E. 17–11–2.

1897:

Wm. Loveland, 10⅓ acres in N. W. 17–11–2 page 78 line 20.

J. D. Besler, 90 acres, part in N. W. 17–11–2, line 22.

Toltec Ranch Co. 320 acres N. ½ of N. W., S. E. of N. W., S. W. of N. E. and ½ of S. W., W. ½ of S. E. 17–11–2, line 27.

Oliver Loveland, 10 acres in *in* N. W. line 28.

O. C. Loveland, 143 acres in N. W. & N. E. 17–11–2, page 78 line- 29–30

Wm. & Duane Loveland, 10 acres in N. W. 17–11–2.

R. C. Fryer, 80 acres S. ½ of N. E. line 32.

1898:

R. C. Fryer, 80 acres in E ½ of N. E. 17–11–2, page 72, line 6.

O. C. Loveland, 143 acres, N. W. & N. E. 17–11–2.

Bank of Salt Lake, 90 acres p't in N. W. 17–11–2, page 79, line 15.

Toltec Ranch Co. 320 acres, S. W. of N. E. ½ of S. W. N. ½ of N. W. S. E. of N W. ¼, W. ½ of S. E. 17–11–2, page 60, line 18.

100 1899:

R. C. Fryer, 80 acres in E. ½ of N. E. 17–11–2.
O. C. Loveland, 40 acres in N. W. of N. E.
Bank of Salt Lake, 90 acres part in N. W. page 88, line 22.
Toltec Ranch Co. 320 acres, E. ½ of S. W. W. ½ of S. E. N. ½ of N. W. S. E. of N. W. S. W. of N. W. page 88, line 23.

101 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 14th*, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter from the office dated May 15th, 1869, addressed to the register and receiver at Salt Lake City, Utah, and a copy of their letter of May 24, 1869, acknowledging the receipt of the original are true and literal exemplifications of the original letters of record and on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] BINGER HERMANN,
Commissioner of the General Land Office.

102 DEFENDANTS' EX. 5.

Refer in reply to this intial: "F."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 15, 1869.

Register and receiver, Salt Lake City, Utah Ty.

GENTLEMEN: I inclose herewith a diagram showing the definite location of the Pacific railroad from the boundary line between Wyoming and Utah Territories to Monument point.

I have also designated the 20-mile limits of the land granted thereon, and you are hereby directed to withhold from sale location or entry filing within those limits, where the same may be surveyed, and as the surveyors progress within the region indicated and the plats are received at your office you will note thereon the withdrawal of the odd-numbered sections, which withdrawal will take effect from the date of the receipt of this letter.

The even-numbered sections now surveyed and those which may be hereafter surveyed within said limits will be increased in price to $2.50 per acre and dealt with at that ratability under the pre-emption and homestead laws.

Should it appear that parties have made *bona fide* settlements under the pre-emption laws on any of the lands prior to the date of receipt of this order of withdrawal such settlers will be permitted to prove up and enter their claims either on odd or even numbered sections at the rate of $1.25 per acre.

Be pleased to acknowledge the receipt of this letter.

It will be observed that upon the diagram now transmitted Monument point is placed further west than in the map sent with our letter of withdrawal of March 19, 1869, the point as at present established is supposed to be nearest correct, and you will therefore correct our former diagram accordingly and consider that
103 point the eastern line of the withdrawal of March 19, until the same can be definitely ascertained by actual surveys.

Very respectfully, JOS. S. WILSON,
Commissioner.

U. S. LAND OFFICE,
SALT LAKE CITY, UTAH, *May 24th*, 1869.

Commissioner Gen. Land Office.

SIR: Your letter of withdrawal of 15th inst. with diagram showing the definite location of the Pacific railroad from the boundary line between Wyoming and Utah Territories, to Monument point, was received at this office today.

Very respectfully, your ob'd't servants,
C. C. CLEMENTS, *Register.*
L. S. HILLS, *Receiver.*

104 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 30, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify the annexed copy of the office letter, dated Oct. 16th, 1873, addressed to the register and receiver at Salt Lake City, Utah, is a true and literal exemplification of the original letters as recorded in this office.

In witness whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

[SEAL.] BINGER HERMANN,
Commissioner of the General Land Office.

105 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 16, 1873.

Refer in reply to this initial: F.

Register and receiver, Salt Lake City, U. T.

GENTLEMEN: I transmit herewith a diagram showing the corrected limits of withdrawal upon the definitely located line of the Union and Central Pacific railroads in Utah Ty., also the former limits of withdrawal upon a temporary line and you are hereby directed to withdraw from sale or entry all odd-numbered sections falling within the corrected (blue) twenty-mile limits not already withdrawn, and to restore to pre-emption and homestead entry all the odd sections heretofore withdrawn for said roads, but now falling outside of said (blue) twenty-mile limits.

The withdrawal will take effect from the date of the definite location of the road.

In order to carry the restoration into effect you will cause notice to be published in the newspaper having the largest circulation in your district that on a day to be fixed by you, and not less than thirty days from date of notice, the lands to be restored will again become subject to pre-emption and homestead entry.

This notice will be and paid for in the usual manner.

You will pay no attention to the ten-mile limits laid down on the diagram, as by a recent Supreme Court decision the company are now required to pay for their surveys within the entire twenty-mile limits.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

106 DEFENDANTS' EX. 7.

Tax-sale Certificate.

This certifies that on the 1st day of February 1898, in pursuance of law, I Fred J. Holton, as treasurer of Box Elder county, Utah, sold to Box Elder Co., subject to redemption as provided by law, the property situated in the county of Box Elder, State of Utah, hereafter described, for the delinquent State, State school, county, county school and district school taxes, assessed in the name of Toltec Ranch Co., as owner, against said property for the year 1897, and the costs of advertising and sale; that a description of the property named is as follows:

N. ½ of N. W. ¼, S. E. of N. W. ¼; S. W. ¼ of N. E. ¼, E. ½ of S. W. ¼, W. ½ of S. E. ¼ in sec. 17, township 11, N. range 2 west, Salt Lake meridian.

That the amount of each kind of taxes and the costs for which the same was sold are as follows, to wit:

State and State school taxes.	County and county school taxes.	District school taxes.	
$16.80	13.44	5.60	
Advertising costs.	**Interest.**	**Costs of sale.**	**Total.**
.25	1.08	2.00	$39.17

and that payment has been made therefor.

Given under my hand this 1st day of February, A. D. 1898.

FRED J. HOLTON,
Treasurer of Box Elder County, Utah.

107 DEFENDANTS' EX. 8.

Central Pacific Railroad Lands, Utah Territory.

Description of lands.						Payments.		
Parts of sections.	Sections.	Township north.	Range west.	Range east.	Acres.	Price per acre.	In full and expense of deed.	First payment of 20 % and interest at 7 % per cent. per annum.
S. E.	15	7	2	....	160.	$1.25	$203.00	$51.20
N. ½ of N. W. ¼, S. W. ¼ of N. W. ¼	23	7	2	...	120.	1.25	153.00	In full.
All	5	7	....	1	595.51	1.25	747.40	190.56
S. ½ of S. E. ¼	7	7	....	1	80.00	3.50	283.00	71.68
All	9	7	...	1	640.	1.25	803.00	204.80
All	15	7	....	1	640.	1.25	803.00	204.80
Lots 1, 2, 3, 4, 5, 6, 7, 8	5	8	2	...	320.10	1.25	410.03	104.36
N. E. ¼, N. ½ of S. E. ¼, S. E. ¼, S. E. ¼	11	8	2	....	280.	1.25	353.00	89.60
S. W. ¼	13	8	2	....	160.	1.25	203.00	51.20
E. ½ of N. E. ¼	23	8	2	....	80.	1.25	103.00	In full.
N. W. ¼	25	8	2	....	160.	1.25	203.00	51.20
N. E. ¼ of N. E. ¼	35	8	2	....	40.	1.25	53.00	In full.
N. W. ¼ of S. E. ¼	1	9	2	....	40.	1.25	53.00	In full.
W. ½ of S. W. ¼, S. W. ¼ of N. W. ¼ of lot 1, of N. W. ¼	3	9	2	....	141.	1.50	215.40	54.37
S. E. ¼ of S. W. ¼ lots 2, 3 and 4	3	9	2	....	160.	1.25	207.62	53.15
E. ½, E. ½ of N. W. ¼, E. ½ of S. W. ¼	9	9	2	....	480.	5.00	2403.00	614.40
Fractional S. ½	19	9	2	....	319.49	1.25	403.37	102.50
E. ½ of E. ½, N. W. ¼	21	9	2	....	400.	2.50	1003.00	256.00
S. W. ¼	21	9	2	....	160.	1.25	203.00	51.20
W. ½ of N. W. ¼	21	9	2	....	80.	4.00	323.00	81.92
W. ½ of S. E. ¼, N. E. ¼ of S. E. ¼	25	9	2	....	120.	5.30	663.00	168.96
N. ½ S. W. ¼	29	9	2	...	480.	1.25	603.00	153.60
Fractional	31	9	2	....	639.84	1.25	802.00	204.75
All	33	9	2	....	640.	1.25	803.00	204.80

DEFENDANTS' EX. 8—Continued.

Central Pacific Railroad Lands, Utah Territory.

Description of lands.						Payments.		
Parts of sections.	Sections.	Township north.	Range west.	Range east.	Acres.	Price per acre.	In full and expense of deed.	First payment of 20% and interest at 7% per cent. per annum.
108 Fractional N. ½, S. W. ¼.	5	9	...	1	479.25	479.25	200.00	245.63
S. ½ of S. W. ¼, N. E. ¼ of S. E. ¼	15	9	..	7	120.00	1.25	153.00	In full.
S. ½ of N. W. ¼	1	10	7	....	80.00	8.00	643.00	163.84
N. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼	27	10	7	....	80.00	1.25	103.00	In full.
N. W. ¼ of N. W. ¼	33	10	1	....	40 00	1.50	63.00	In full.
S. W. ¼ of N. W. ¼, N. W. ¼ of S. W. ¼.	33	10	1	....	80.00	2.50	203.00	51.20
Lot- 1, 5, 6, & 17	7	10	2	..	153.20	5.50	845.60	215.70
Lot- 2, 4, 7 & 10	7	10	2	..	207.80	4.00	834.20	212.80
E. ½ of N. E. ¼, N. W. ¼ of N. E. ¼	15	10	2	....	120.00	1.25	153.00	In ful.
Lot 1 of N. E. ¼	17	10	2	...	44.00	1.25	58.00	In full.
E. ½ of S. E. ¼	17	10	2	....	80.00	4.00	323.00	81.92
Lot 2 of S. E. ¼, lot- 3 & 4 of N. W. ¼, S. W. ¼ of S. E. ¼	17	10	2	...	214.70	6.25	1344.14	343.32
E. ½ of N. W. ¼, E. ½ of S. W. ¼.	21	10	2	....	560.00	1.50	843.00	215.04
W. ½, S. W. ¼	21	10	2	...	80.00	2.50	203.00	51.20
E. ½, N. W. ¼, W. ½ of S. E. ¼	23	10	2	....	160.00	1.25	203.00	51.20
W. ½ of S. W. ¼, S. W. ¼ of N. W. ¼	25	10	2	....	120.00	1.25	153.00	In full.
N. W. ¼, W. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, lots 1, 2, 3, 4	27	10	2	....	450.20	1.25	565.75	144.06
Lot- 1, 2, 3	33	10	2		96.00	2.50	243.00	61.44
Lots 3, 4	33	10	2	...	122.00	5.00	613.00	156.16
E. ½ of S. E. ¼	7	10	....	1	80.00	4.50	403.00	102.40
S. ½ of S. E. ¼	13	10	....	1	80.00	1.25	103.00	In full.
S. E. ¼ of N. W. ¼	15	10	....	1	40.00	5.50	223 00	56.32
Fractional W. ½, S. ½ of S. E ¼	19	11	1	...	403.20	1.25	507.00	129.02
E. ½ of S. E. ¼, S. E. ¼ of N. E. ¼	5	11	2	...	120.	1.25	153.00	In full.
S. W. ¼ of S. W. ¼	5	11	2	...	40.00	5.50	223.00	56.32
Lots 3, 4, 11	7	11	2	....	103.10	4.00	415.40	105.60

109 *Central Pacific Railroad Lands.*

Description of lands.						Payments.		
Parts of sections.	Sections.	Township north.	Range west.	Range east.	Acres.	Price per acre.	In full & expense of deed.	First payment of 20 % & interest at 7 % per annum.
Lots 6, 7, 8	7	11	2	...	129.40	$4.50	$585.30	$149.07
Lots 9, 10	7	11	2	....	90.29	5.00	454.45	115.57
W. ½ of N. W. ¼, W. ½ of S. W. ¼	9	11	2	...	160.00	1.25	203.00	51.20
All	13	11	2	...	640.00	1.25	803.00	204 80
Lots 5, 6, 7	13	11	2	...	120.10	3.00	363.30	92.23
Lots 1, 11	19	11	2	...	92.50	2.50	234.25	59.20
Lot 12	19	11	2	....	18.00	5.00	93.00	In full.
W. ½ of N. W. ¼	21	11	2	...	80.00	5.50	443.00	112.64
E. ½ of S. W. ¼, S. E. ¼ of N. W. ¼	21	11	2	....	120.00	1.50	183.00	In full.
West ½ of S. E. ¼, S. E. ¼ of S. E. ¼	21	11	2	...	120 00	1.25	153 00	In full.
N. E. ¼	25	11	2	....	160.00	1.25	203.00	51.20
N. E. ¼	33	11	2	..	160.00	1.25	203.00	51.20
N. W. ¼ of N. E. ¼	11	11	....	1	40.00	2.50	103.00	In full.
Fractional	5	12	1	..	64.00	2.50	1603.00	409.60
N. E. ¼, N. ½ of N. W. ¼	13	12	1	...	240.00	3.50	843.	215.04
S. ½ of N. W. ¼	13	12	1	....	80.00	5.00	403.00	102.40
S. W. ¼ W. ½ of S. E. ¼ W. ½ of N. W. ¼	1	12	1	...	320.	1.50	483.48	123.04
E. ½ of N. E. ¼, S. ½ of S. W. ¼	3	12	2	....	160.15	1.50	243.22	61.50
Lots 3, 4	3	12	2	...	79.80	5.00	402.00	102.20
N. W. ¼ of S. W. ¼	3	12	2	..	40.00	3.00	123.00	In full.
N. E. ¼ of S. E. ¼	3	12	2	..	40 00	2.50	103.00	In full.
E. ½ of N. E. ¼, S. ½ of N. W. ¼	5	12	2	....	159.92	5.00	802.60	204.70
N. W. ¼ of S. E. ¼ lot 6 of S. W. ¼	5	12	2	...	101.10	4.00	407.40	103.53
N. E. ¼ of S. W. ¼ lots 5 and 7 of S. E. ¼	5	12	2	....	83.20	3.00	252.60	63.90

West
South
North
C. C. Copeland
Wm. Babcock
Denyville Road
No. 217
Toltec Ranch Co
Wm Babcock et al
p. 111
Pg 3

Central Pacific Railroad Lands—Continued.

Description of lands.						Payments.		
Parts of sections.	Sections.	Township north.	Range west.	Range east.	Acres.	Price per acre.	In full & expense of deed.	First payment of 20% & interest at 7 % per annum.
110 S. E. ¼ of S. W. ¼....	5	12	2	....	40.00	3.50	143.	In full.
W. ½ of N. E. ¼, E. ½ of S. W. ¼.....	7	12	2	....	160.	4.00	643.	163.84
N. E. ¼ of N. E. ¼, lot 5, S. E. ¼.....	7	12	2	...	73.40	2.75	204.32	51.54
Lot 3 & 4 of S. W. ¼.....	7	12	2	...	80.00	5.00	403.	102.40
E. ½ of N. E. ¼, W. ½ of S. E. ¼.....	17	12	2	....	160.00	2.50	403.	102.40
W. ½ of N. E. ¼.....	17	12	2	....	80.00	3.50	283.	71.68
E. ½ N. W. ¼..	17	12	2	....	80.00	5.50	443.	112.64
E. ½ S. E. ¼.....	17	12	2	....	180.00	1.50	123.	In full.
Lots 5, 6, 7, 8, 9, 10.....	19	12	2	...	188.00	3.50	661.	164.44
Lot 4.....	19	12	2	...	31.50	4.50	144.75	In full.
S. E. ¼	29	12	2	....	160.	1.25	203.	51.20
S. W. ¼.....	29	12	2	....	160.	1.50	243.	61.44
S. ½ of N. W. ¼	29	12	2	....	180.	2.50	203.	51.20
Lots 1, 2 N. W. ¼, E. ½ of N. W. ¼, W. ½ N. E. ¼....	31	12	2	....	239.89	5.00	1202.45	307.06
Lots 3, 4, 7, & 9.....	31	12	2	....	165.90	3.50	583.65	148.65
All.....	33	12	2	....	640.	1.25	803.	204.80
Lots 3 & 4, S. W. ¼.....	19	13	1	....	80.86	1.50	124.30	In full.
N. ½ of N. E. ¼, N. ½ of N. W. ¼.....	33	13	1	....	160.	1.50	243.	61.44
Lots 3 & 4 S. W. ¼	7	13	12	....	179.93	2.00	162.86	In full.
S. E. ¼	17	13	2	....	160.	1.50	243.	61.44
S. W. ¼.....	17	13	2	....	160.	2.	320.00	81.92
N. E. ¼	21	13	2	....	160.	1.25	203.	51.20
W. ½ & S. E. ¼	23	13	2	....	480.	1.50	723.	184.32
E. ½ of E. ½ N. W. ¼, E. ½ of S. W. ¼.....	27	13	2	..	480.	1.25	603.	153.60
W. ½ of N. W. ¼, N. W. ¼ of S. W. ¼	27	13	2	...	120.	1.50	183.	In full.
S. W. ¼ of S. W. ¼.....	27	13	2	....	40.	3.	123.	In full.
E. ½ of S. W. ¼.....	33	13	2	....	80.	2.50	203.	51.20

(Here follows diagram marked p. 111.)

112 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant, and LOUISE BABCOCK, Intervener.
} Stipulation.

It is hereby stipulated by and between the parties hereto, that, in the two cases above entitled, being Nos. 270, 278, heretofore consolidated and tried together, only one bill of exceptions shall be proposed, prepared, served, signed and settled, and when signed and settled, by the court, the said bill of exceptions shall be a part of the record of both and in each of said causes; and it is further stipulated that on appeal to the Supreme Court, said cases may be appealed together and heard and considered together, therein, and that said bill of exceptions shall be of and a part of the record in each of said cases, and that on such appeal only one abstract of record and one brief shall be printed and used for both said cases.

CHASE AND CHASE,
T. D. JOHNSON,
Attorneys for Plaintiff.
B. H. JONES,
Attorney for Defendant and Intervener.

113 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH CO., a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant; LOUISE BABCOCK, Intervener.
} Nos. 270 and 278.

Notice of Intention to Move for a New Trial.

Please take notice that the above-named plaintiff intends to move the court to set aside and vacate the verdict rendered herein, and to grant a new trial in said cause, upon the following grounds, viz:

1. Insufficiency of the evidence to justify the verdict.
2. That the said verdict is against law.
3. Errors at law occurring at the trial and excepted to by the said plaintiff.

Said motion will be made upon the minutes of the court.

T. D. JOHNSON,
CHASE AND CHASE,
Attorneys for Plaintiff.

To the said defendants and intervener and to B. H. Jones, their attorney.

Dated July 5th, 1900.

Indorsed: Service of copy is acknowledged this 6th day of July, 1900. B. H. Jones, att'y for def'ts. Filed July 6, 1900. Geo. Graell, clerk.

114 In the District Court of the First Judicial District, Box Elder County, State of Utah, February Term.

FEBRUARY 25, 1901.

Present: The Hon. C. H. Hart, judge, and officers of the court.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM BABCOCK, Defendant, and Louise Babcock, Intervener.	Order Denying Plaintiff's Motion for New Trial. Nos. 270 and 278.

On this day by stipulation of counsel, T. D. Johnson, Esq., for plaintiff, and B. H. Jones, Esq., appearing for defendant and intervener, the plaintiff's motion for new trial came on regularly for hearing; after argument by counsel, the said motion was submitted to the court, thereupon the court being fully advised in the premises, ordered that said motion be and the same is denied, in each of the said cases.

CHAS. H. HART, *Judge.*

Entered in the minutes of the said court.

115 In the District Court of the First Judicial District, Box Elder County, State of Utah, February Term.

MARCH 6, 1901.

Present: Hon. Chas. H. Hart, judge, and officers of the court.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM BABCOCK, Defendant, and LOUISE BABCOCK, Intervener.	Order. No. 270 and 278.

In the above-entitled cases, George R. Chase appearing as counsel for plaintiff asks that fifteen days additional time be granted plaintiff in which to prepare and serve its bill of exceptions. After being fully advised and good cause appearing therefor it was by the court ordered that fifteen days further time be allowed plaintiff in which to prepare and serve its bill of exceptions in the above-entitled cases.

CHAS. H. HART, *Judge.*

Minute entry.

116 I hereby acknowledge the service upon me of the within and foregoing proposed bill of exceptions as and for cases

No. 270 and 278 this the third day of April, 1901. No rights waived.

B. H. JONES,
Attorney for Defendant and Intervener.

I hereby certify that the above and foregoing bill of exceptions is full, true and correct, and that the same is hereby settled and allowed as and for the bill of exceptions in and for cases numbered 270 and 278, and that the same has been served, filed, settled and allowed in the time allowed by law and as extended by order of court.

CHAS. H. HART, *Judge.*

117 In the District Court of the First Judicial District of the State of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant, and LOUISE Babcock, Intervener.
} Nos. 270 and 278. Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled — appeals to the supreme court of the State of Utah, from the judgments therein made and entered in said district on the 11th day of July, 1901, in favor of, said defendant and intervener, and against the said plaintiff, and from the whole of said judgment.

This appeal is taken on questions of both law and fact.

Dated Aug. 16, 1901.

CHASE AND CHASE AND
T. D. JOHNSON,
Attorney for Plaintiff and Appellant.

To the clerk of the above-entitled court and to B. H. Jones, attorney for said defendant and intervener.

118 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM BABCOCK, Defendant; LOUISA BABCOCK, Intervener.

STATE OF UTAH,
County of Box Elder, } *ss:*

I, Joseph Jensen, clerk of the district court of the first judicial district of the State of Utah, in and for Box Elder county, do hereby certify that the above and foregoing is the original judgment-roll, in the above-entitled action, being No. 270, filed July 11th, 1901; the original judgment-roll in the above-entitled action being No. 278, filed July 11th, 1901; the bill of exceptions settled in both said

causes, filed for settlement April 25th, 1901, the petition in error, filed herein and attached hereto by the plaintiff herein, and the original notice of appeal filed August 16, 1901, and that all the foregoing are transmitted to the supreme court pursuant to such appeal.

And I do further certify that an undertaking on appeal in due form has been filed herein, the same having been filed on August 16, 1901.

Witness my hand and the seal of said first district court hereto affixed, this the 19th day of August, A. D. 1901.

[SEAL.] JOSEPH JENSEN, *Clerk.*

119 *Petition in Error.*

In the Supreme Court of the State of Utah, October Term.

Nos. 270 and 278.

(Title of Court and Cause.)

Your petitioner, The Toltec Ranch Company, a corporation, the plaintiff and appellant in the above-entitled actions, herewith files in accordance with the statute in such cases made and provided, this its petition in error, and attaches the same to the transcript on appeal, and respectfully petitions this honorable court to reverse the decisions of the court below, and to that end, your petitioner, the appellant, sets forth the following errors, and relies upon each and every of them, for a reversal of said causes, viz:

1. The trial court erred in granting the demand of the defendant and intervenor for a jury, and in permitting the empanelling of a jury, and the hearing and trial of said causes herein by a jury, over the objection of the plaintiff that no jury fee had been paid by said defendant or intervenor in said causes. (Transcript p. 60.)

2. The trial court erred in overruling the objection of the plaintiff to the introduction in evidence by the defendant and intervenor of that certain list of lands identified as received by the witness Thomas Fryer from the Central Pacific Railroad Company, the same being a discription of lands, and marked Defendants' Exhibit "8." The same being incompetent, irrelevant, and immaterial. (Transcript p. 75.)

3. The trial court erred in overruling the plaintiff's objection to the introduction in evidence of the certified copy of the letter from the Commissioner of the Land Office, dated May 15, 1869, and marked Defendants' Exhibit "5," introduced on behalf of defendant and intervenor, and the court erred in permitting the same to be received in evidence, the same being incompetent, irrelevant, and immaterial. (Transcript, page 79.)

120 4. The trial court erred in overruling plaintiff's objection to the introduction in evidence of the certified copy of the latter from the Commissioner of the Land Office, dated October 16, 1872, and marked Defendants' Exhibit "6," introduced on behalf of defendant and intervenor, and the court erred in permitting the

same to be received in evidence, the same being incompetent, irrelevant and immaterial. (Transcript, p. 79.)

5. The trial court erred in overruling the motion of plaintiff, made when the defendant and intervenor had rested their case, to peremptorily instruct the jury in favor of the plaintiff and against the defendant and intervenor, in each of the causes of action on trial therein, and erred in denying said plaintiff's motion and submitting to the jury the question of adverse possession under the testimony, in that, the testimony, introduced on behalf of said defendant and intervenor wholly failed to show any claim of holding the premises in dispute adversely, and wholly failed to show that the said intervenor had ever, at any time, openly, continuously, notoriously and adversely held, or claimed to have held said premises, and that the evidence introduced on behalf of the said defendant and intervenor was wholly insufficient to make out a case to be submitted to the jury. (Transcript p. 80.)

6. The trial court erred in sustaining the objection of the defendant and intervenor to the introduction in evidence of plaintiff's Exhibit "A" for identification, the same being the application of Anson C. Loveland, filed with the Central Pacific Railroad Company, bearing date July 1, 1876, for the purchase of the lands in dispute, with other lands, in that the same was competent, relevant and material, and evidence tending to show the want of notice of the said railroad company that the said intervenor was or might be holding or claiming to hold the said premises adversely. (Transcript p. 87.)

7. The trial court erred in sustaining the objection of the defendant and intervenor to the introduction in evidence of plaintiff's Exhibit "B" for identification, the same being the application of Orson C. Loveland, filed with the Central Pacific Railroad Company, bearing date July 1, 1876, for the purchase of other lands in section 17, in which the lands in dispute were situated, in that the same was competent, relevant and material, and evidence tend-
121 ing to show the want of notice of the said railroad company that the said intervenor was, or might be holding or claiming to hold the said premises adversely. (Transcript p. 87.)

8. The trial court erred in sustaining the objection of the defendant and intervenor, and in refusing to permit the witness Tarpey to state what Carl Loveland, A. E. Snow and Orson Loveland stated to him as to whom they represented at the time the contract made by them with him was entered into. (Transcript pp. 88, 89.)

9. The trial court erred in sustaining the objection of the defendant and intervenor to the question of plaintiff to the witness Louisa Babcock, the intervenor, to wit: "If it was railroad land, your intention was just to take it for nothing?" and erred in sustaining the objection of the defendant and intervenor to the question of plaintiff to the said witness to wit: "Do you remember as a fact, that Mr. Loveland in his lifetime, about 1884, attended a meeting of the settlers over in that neighborhood, and in fact, all this country round, with a representative of the Central Pacific Railroad Company here in Brigham, to confer about these various lands, and ar-

range about the price of them from the railroad company?" (Transcript pp. 107, 108.)

10. The trial court erred in refusing plaintiff's request for instruction number "1," to instruct the jury to return a verdict in each of said causes in favor of the plaintiff, and against the defendant and intervenor. (Transcript p. 114.)

11. The trial court erred in giving instruction number "6" in that in said instruction the court instructed the jury that the requisites necessary to constitute adverse possession are such as are only provided by statute, leaving out the other and necessary requisites required by law to make out such a defense. (Transcript p. 111, exception p. 113.)

12. The trial court erred in giving instruction number "9," that prior to the year 1884, the statutory period for adverse possession was five years instead of seven years, and that the person possessing adversely was not required to show that he had paid taxes assessed upon the same. (Transcript p. 112, exception p. 114.)

122 13. The trial court erred in entering judgment in favor of the defendant and intervenor and against the plaintiff, in that, under the evidence in said causes, seven years had not expired since the date of the patent issued by the United States to the Central Pacific Railroad Company, before the commencement of these actions, and in that, the defense of adverse possession did not begin to run prior to the issuance thereof. (Transcript pp. 119, 120.)

14. The trial court erred in entering judgment in favor of the defendant and intervenor and against the plaintiff, in that, the evidence introduced by said defendant and intervenor is wholly insufficient in law to make out the defense of adverse possession, in that it appears therefrom, from all the evidence that Chester A. Loveland, during his lifetime was understood to be the owner of said premises, and it further appears that he always held under and subordinate to the Central Pacific Railroad Company; that it appears from the whole testimony that the said intervenor never at any time openly, notoriously and continuously claimed to hold the said premises adversely, and admitted that she knew that the said lands belonged either to the United States Government or to the railroad company, in that, the evidence shows that neither the plaintiff, nor any of its predecessors in interest, ever at any time had notice, or were put upon notice that the said intervenor was claiming to hold the said premises adversely, but, on the contrary, the said testimony shows, that they, and each of them, always supposed the occupants of the said premises to be holding the same in subordination to their title.

Upon the hearing of the said causes in the supreme court of the State of Utah, the said plaintiff and appellant will rely upon each and every of the above and foregoing assignments of error for a reversal of the said causes.

T. D. JOHNSON,
Attorney for Appellant.

123 In the Supreme Court of the State of Utah, Regular October Term.

OCTOBER 24, 1901.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
WILLIAM BABCOCK, Respondent, and LOUISE BABCOCK, Intervener. } Submission.

This cause coming on regularly to be heard, was argued by Hon. T. D. Johnson, in behalf of the appellant; by Mr. B. H. Jones, in reply, was submitted, and by the court taken under advisement.

Judgment.

Title of Court and Cause.

DECEMBER 13, 1901.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby affirmed, with costs.

124 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
WILLIAM BABCOCK, Respondent; LOUISE BABCOCK, Intervener.

The record shows that the plaintiff instituted two suits against the defendant and intervenor,—the one an action in ejectment to recover the possession of 64 acres of land, and the other in replevin for hay and Lucerne seed grown on the land in controversy. At the trial the actions were both consolidated and tried together before a jury. The court held that the parties were entitled to a jury trial without the payment of a jury fee, as provided by statute, by reason of an affidavit of impecuniosity having been filed by the defendant, who demanded the jury. The complaint in ejectment was filed August 14, 1899, and alleged possession and ouster November 4, 1897, and unlawful retention of possession on the part of the defendant. The defendant in his answer, denies generally the allegations of the complaint; then, *inter alia*, alleges that he holds the property in dispute as agent for his wife, the intervener; that he and his wife have been in the actual and peaceable possession of the lands and have occupied and cultivated the same for more than 32 years last past; and set up the statute of limitations in bar of the action. The intervener filed a similar answer and cross-complaint, which also contained an allegation to the effect that the lands in controversy were excepted from the
125 grant of lands by the United States to the Central Pacific Railroad Company. In its reply to the defendant's answer

the plaintiff admitted "that said Louisa Babcock and her predecessors in interest have held and occupied the premises mentioned exclusively for more than thirty years since the entry upon the same in 1867." From the evidence it appears that the land in controversy was embraced within the grant of Congress to the Central Pacific Railroad Company; that on September 5, 1896, the railroad company received a patent for it, and on May 4, 1897, conveyed the same to the plaintiff; that the intervener, Louisa Babcock, was the plural wife of Chester Loveland; that the latter obtained possession of the said land in 1875 or 1876, and moved his plural wife, the intervener, onto the place the same year, and afterwards gave it to her; that she lived there right along until his death, in 1886, and continued to live there ever since, and to improve and cultivate the land, and to raise and gather crops thereon for the support of herself and children; that the disputed land has been occupied, fenced, improved, and cultivated from about the year 1867; that the intervener has occupied and so cultivated the land for more than 25 years, and raised her family thereon; that Chester Loveland lived in Brigham city, while she was his plural wife, and lived on the land; that since 1889, when she married the defendant, she and her husband have both had their home on the premises, and tilled the land; that she always claimed it as her home and used it as her own, and that in the neighborhood it was known as the "Loveland place." As to the payment of taxes, the intervener testified: "I began to pay taxes on this land at the death of my first husband, Mr. Loveland. It was whenever I was assessed I paid the taxes." As to who claimed and used the land, the witness Mary A. Dewey testified: "A number of people, one after another, occupied these lands from about 1864 until one Lish got it. He remained there until he sold to Mr. Loveland. I do not know just what year that was. I have known Mrs. Louisa Babcock about 32 years. She was the plural wife of Chester Loveland. She moved upon the land in dispute about 25 years ago, and has lived there ever since. She used it for a home, for farming, and cut hay to support her family. Mrs. Babcock has a family of six or seven children, who have lived with her on the land. She married Mr. Babcock 10 or 11 years ago. He has been living there since that time. There is no difference at all between the way people who have occupied this land have used it and the way any other farmers used theirs." The witness Fryer said: "There were improvements on this land in '76. There was a log cabin, a pole corral, and a cellar. Some of it was fenced in. In '69 this land was inclosed in the big field. The land in dispute for the past 25 years has been designated in that neighborhood as the 'Loveland place.'" The witness Gardner testified: "Have been acquainted with Louisa Babcock since she moved out there,—between 20 and 25 years. She tended to the land the same as the rest of us have, or had it done by her children, every year since Uncle Chester died. Before that he attended to it. During all the time that I knew Chester Loveland, Louisa Babcock was living in this house on the land in dispute, and getting the profits of the land. Loveland told me she was his plural wife, and he used to go up

there and live with her. It (the land) went to her after he died. He left it to her; said that it was her home. That was the understanding of all the people,—that was her land or home, left for her when he did die,—that was to be her place." The witness Tarpey, who is the agent of the plaintiff, and previously had also represented the railroad company, testifying for the plaintiff, said that he had entered into a contract with Carl and Orson Loveland, sons of Chester Loveland, they claiming to represent the intervener, whereby they agreed to pay for the land; and that afterwards, in a conversation with the intervener, he found she understood all about the contract, and said Orson Loveland had agreed to purchase the land for her. The intervener, testifying, denied that she told Tarpey that she had such an agreement with Orson, and stated no contract was shown her, and that there was "no contract, no agreement, no nothing on her part." In her testimony also appear statements as follows: "I told Orson I had always claimed the 64 acres. I base my claim to the land on my husband buying it from Mr. Lish and giving it to me as my home. Twenty-five years ago my husband gave it to me as my home." There appears to be nothing in the testimony to show that during all these years—at least until after 1897, when the land was conveyed to the plaintiff—the possession of the defendant and intervener was not peaceable and uninterrupted. It seems there was nothing to interfere with their possession until Mr. Tarpey made his appearance as agent of the plaintiff company. Under this and other evidence of similar import, and under evidence of a conflicting character, the jury found the issues in favor of the defendant and intervener, and returned a verdict of no cause of action. Upon judgment having been rendered accordingly this appeal was prosecuted.

A statement of the case as above having been made, BARTCH, J., delivered the opinion of the court.

The appellant in the first instance insists that the court erred in granting a trial by jury at the request of the defendant, without advancing the jury fees required by section 3129, Rev. St. The answer to this contention is that the affidavit of impecuniosity filed by the defendant, relieved the party from the necessity of complying
125a with the requirements of that section, such affidavit being provided for in sections 1016–1018, Rev. St. Upon the filing of the affidavit such fees became taxable as costs, under section 1019, Rev. St., at the close of the trial. Hoagland *v.* Hoagland, 18 Utah, 304, 54 Pac. 978.

The controlling question in this case is whether Louisa Babcock's long-continued possession and use of the land in dispute were of such a character as to ripen into a title by virtue of the statute of limitations. The provisions of that statute which are material here are found in sections 3131–3133, 3137, Comp. Laws Utah, 1888, and like provisions in sections 2859–2861, 2865, Rev. St. These sections fix the period of limitation as to real property at seven years, and under their provisions, where such property is held and possessed adversely to the legal title for that length of time, the party so holding and possessing acquires the title to the property by adverse pos

session. As to what constitutes adverse possession of real property, it is provided in section 2865, Rev. St., as follows: "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only: (1) Where it has been protected by a substantial inclosure. (2) Where it has been usually cultivated or improved." The statutory provisions are the same where a person claims title founded upon a written instrument. Section 2863, Rev. St. And the same provisions are found in sections 3135, 3137, Comp. Laws Utah, 1888. It will thus be seen that under our statutory provisions, where a person claims title founded on a written instrument or not founded on a written instrument, in either case the land is deemed to have been possessed and occupied adversely. Where it has been protected by a substantial inclosure, or where it has been usually cultivated or improved, and where such possession and occupancy have been so continued for more that seven years, the possession cannot be disturbed by the person claiming the legal title. In the case at bar the intervener claimed title to the land in dispute by gift from Chester Loveland, who, it seems, bought it from one Lish, without, however, obtaining any other title than such as the vendor had by right of possession, the legal title to the land being then in the Central Pacific Railroad Company. The intervener thereafter always claimed the premises as her home. The land was protected by a fence—a substantial inclosure—cultivated, improved, and crops raised thereon by herself and husband for the family for admittedly more than 20 years. The land was occupied and used the same as other lands were in that neighborhood. The possession, as appears from the evidence, was open, notorious, uninterrupted, and peaceable, and under a claim of right. It must, therefore, necessarily be deemed to have been adverse to the holder of the legal title, and such long-continued possession may be deemed to have been adverse though not in its character hostile. "Where one is shown to have been in possession of land for the period of limitation, apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse." 1 Am. & Eng. Enc. Law (2d ed.) 889, 890; 3 Washb. Real Prop. (4th ed.) 159, par. 43. The possession and occupancy, under the circumstances herein admitted and proved, were notice to all the world of the possessor's rights, and *prima facie* evidence of property, and of a seisin in fee; and, the longer the possession was continued undisturbed, the stronger became the conclusion that there was a legal origin for it. Busw. Lim. § 2. "Every possession is taken to be on the possessor's own title until the contrary appears, as the possession is in itself the strongest evidence of the claim of title, and, when long continued, of the title also." Jackson *v.* Hillsborough Com'rs, 18 N. C. 177. In Patterson *v.* Reigle, 4 Pa. 201, 45 Am. Dec. 684, on the question of adverse possession, Mr. Chief Justice Gibson said: "There is a presumption, which lasts till it is rebutted, that an intruder enters to hold for himself; and it is not to be doubted that a trespasser entering to gain a title, though conscious that he is a wrong-doer, will accom-

plish his object, if the owner do not enter or prosecute his claim within the prescribed period. But to do so it is necessary that his possession be adverse from the first, and to infer that he intended it to be otherwise would impute to him an inconsistency of purpose." Mr. Justice Baldwin, in Boone *v.* Chiles, 10 Pet. 177, 223, 9 L. Ed. 388, speaking for the Supreme Court of the United States, said: "The possession of land is notice of a claim to it by the possessor. Sugd. Vend. 753. If not taken and held by contract or purchase, it is from its inception adverse to all the world, and in twenty years bars the owner in law and equity." Busw. Lim. § 242; Ruffin *v.* Overby, 88 N. C. 369; Stock Co. *v.* Dixon, 10 Utah, 334, 37 Pac. 573; Ricard *v.* Williams, 7 Wheat. 59, 5 L. Ed. 398; Bowman *v.* Wathen, 1 How. 189, 11 L. Ed. 97; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171; Talbert *v.* Singleton, 42 Cal. 390. But counsel for the appellant insist that the statute of limitations could only begin to run from the issuance of patent, and that, therefore, the defense of adverse possession must fail. This position would be sound if the legal title to the land had remained in the United States until the patent was issued; but such was not the case. The land controversy constituted part of the lands granted by Congress to the Central Pacific Railroad Company. The original grant was made by the act of July 1, 1862 (12 Stat. 489), and the amount of that grant was enlarged by the act of July 2, 1864 (13 Stat. 356). The grant was one *in præsenti*, and vested the
125*b* legal title to the land in the railroad company, subject to some conditions relating to the construction of the line of railroad, and the identification of the lands. The lands which passed by the grant became identified October 20, 1868, the date of the filing of the map of definite location in the office of the Secretary of the Interior. Tarpey *v.* Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042. Upon their identification, and the location and construction of the road, the title vested in the grantee as of the date of the grant, and the patent thereafter issued by the Government was not essential to vest the legal right, but it constituted evidence that the conditions of the grant had been complied with by the grantee, and to that extent relieved the grant from the possibility of forfeiture for failure to comply with those conditions. The grantee, thus being vested with the legal title, had the right to enter upon the land, occupy, and use it after identification, the same as after the patent had been issued. On this subject Mr. Justice Field, delivering the opinion of the court in Salt Co. *v.* Tarpey, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999, after a review of the authorities, said: "It would, therefore, seem clear that the title which passed under the act of Congress by the grant of the odd sections became by their identification so far complete as to authorize the grantee to take possession and make use of the lands; and in the exercise of that authority the grantee took possession from time to time as the lands became identified by the location of the line of road, and made sales of parcels of the lands, and executed mortgages on other parcels with sections of the road constructed, for the purpose of raising money to meet expenses already incurred and

which might thereafter be required for the completion of the road; and such mortgages were authorized by Congress." Again, in the same case, that eminent jurist said: "While not essential to transfer the legal right, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed. They would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the Government. They would thus be, in the grantee's hands, deeds of further assurance of his title, and therefore a source of quiet and peace to him in its possession." So Mr. Justice Brewer, in speaking for the court in Tarpey *v.* Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042, said: "And surely Congress, in making a grant to a railroad company, intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the railroad company could at once use, and use with knowledge of that which it had received." Van Wyck *v.* Knevals, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; Railway Co. *v.* Dunmeyer, 113 U. S. 629, 5 Supt. Ct. 566, 28 L. Ed. 1122; Wisconsin Cent. R. Co. *v.* Price Co., 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. The railroad company having had, as we have seen, the legal title to the land in dispute at least from time of the filing of the map of definite location with the Secretary of the Interior, and having had the right to enter upon, occupy, and use the land, there would seem to be neither reason nor authority to hold that the statute of limitations did not run against the company and its grantee as well before as after the issuance of the patent, and this even though the intervener may have supposed that her title was subordinate to that of the United States; for possession held in subordination to the title of the Government may be adverse as to another claimant. Francoeur *v.* Newhouse, 14 Sawy. 600 (C. C.) 43 Fed. 236; 9 Am. & Eng. Enc. Law, 58; Hayes *v.* Martin, 45 Cal. 559.

From the foregoing considerations, and from a careful examination of the proof, we are of the opinion that the intervener is entitled to hold the land in controversy, and the crops raised thereon, by adverse possession, and that, as against the plaintiff, she has the absolute title thereto. We see nothing in the record which justifies a reversal. The judgment is affirmed, with costs.

Miner, C. J., and Baskin, J., concur.

125c In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant,
vs.
WILLIAM BABCOCK, Defendant, and LOUISA BABCOCK, Intervener, Respondents.

Application for Writ of Error.

Comes now the plaintiff and appellant, Toltec Ranch Company, a corporation, and says that in the final judgment rendered by the supreme court of the State of Utah herein on the 13th day of December, 1901, and in the order in said court denying a rehearing therein, made on the 25th day of January, 1902, and in the proceedings had prior thereto certain errors were committed to the prejudice of said plaintiff, which will more in detail appear from the assignment of errors to be filed as a part of this petition, and further says that in the final judgments of the first judicial district court of Box Elder county, State of Utah, in this cause a decision was had against the validity of certain statutes of the Congress of the United States, and against the title of the plaintiff to certain lands situated in the State of Utah to which it claimed title under certain statutes of the United States—that is to say, the Pacific Railroad grants—and to which it claimed title under and by virtue of a patent to said land having on the 5th day of September, 1896, been issued to its predecesor in interest by the Government of the United States—which said statutes and said patent were drawn in question by said litigation, the plaintiff claiming that the lands mentioned and described in said action were lands which were in the grant to the Central Pacific Railroad Company of California, and that under the terms of said grants and of the said patent the plaintiff was entitled to recover the possession thereof from the defendant and intervenor, in said action, and to recover the possession of the personalty grown thereon, in the said action for the recovery thereof, and the defendant and intervenor claiming and contending, that notwithstanding the said
125d patent issued within the period of seven years before the commencement of the said actions, that under the terms of the said grants of Congress to the said railroad company, the said intervenor could and had acquired title to said lands by adverse possession under the statutes of limitations of the State of Utah, against the said plaintiff and its predecessors in interest and grantors. That the decision of the first judicial district court, wherein the said causes were tried, was against the authority and validity of the claim of plaintiff, and the decision of the supreme court was against the authority and validity of the claim of the plaintiff.

Wherefore this plaintiff prays that a writ of error may issue in its behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that the transcript, papers, and records in this cause, together with the opinion of this honorable

court herein, all duly authenticated, may be sent to the Supreme Court of the United States.

Dated January 31st, 1902.

T. D. JOHNSON,
Attorney for Plaintiff, Toltec Ranch Company, a Corporation.

[Endorsed:] 1327. Toltec Ranch Co. *vs.* Wm. Babcock. Application for writ. Filed Jan. 31 1902. —— —— clerk supreme court, Utah.

125*e* In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant, *vs.* WILLIAM BABCOCK, Defendant, and LOUISA Babcock, Intervenor, Respondents. } Allowance of Writ of Error.

On this the 31st day of January, 1902, came the said Toltec Ranch Company, a corporation, plaintiff, by its attorney of record herein, T. D. Johnson, and filed and presented herein a petition praying for the allowance of a writ of error intended to be urged by it; praying also that a duly authenticated transcript of the record, proceedings, papers, and opinion upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such full and fair proceedings may be had as may be proper in the premises.

In consideration thereof I, James A. Miner, chief justice of the supreme court of the State of Utah, do hereby allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars.

JAMES A. MINER,
Chief Justice.

[Endorsed:] 1327. Writ allowed. Filed Jan. 31 1902. —— ——, clerk supreme court Utah.

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a suit which — in the supreme court of the State of Utah, before you, being the highest court of law or equity of said State in which a decision could be had in said State between The Toltec Ranch Company, a corporation, plaintiff and William Babcock defendant and Louisa Babcock intervenor, wherein was drawn in question construction of statutes of the Congress of the United States, and your decision was against the title specially set up and claimed to the real and personal property in dispute in said action which the

plaintiff claimed title to by virtue of land grants and of a patent from the United States to the plaintiff's predecessor in interest, which said land grants are evidenced by acts of Congress of the United States, and which said patent was executed by the President of the United States by virtue of the acts of Congress of the United States, and your decision was against the validity of said title specially set up and claimed under such statutes and patent, and manifest error hath happened, to the great damage of the said Toltec Ranch Company, as by its complaint appears, we, being willing that error, if any hath happened should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days of the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31 day of January, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

127 Allowed by
JAMES A. MINER,
Chief Justice of the Supreme Court of the State of Utah.

[Endorsed:] 1327. Writ.

128 In the Supreme Court of the United States.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff in Error,
vs.
WILLIAM BABCOCK and LOUISA BABCOCK, Defendants in Error.
} Citation.

To William Babcock and Louisa Babcock, defendants in error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in Washington, in the District of Columbia, within 60 days of the date of this citation, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, Utah, wherein The Toltec Ranch Company, a corporation is plaintiff in error, and you, the said William Babcock and Louisa Babcock are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned,

should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 31st day of January, A. D. 1902.

JAMES A. MINER,
Chief Justice of the Supreme Court of the State of Utah.

I hereby acknowledge due and legal service of the foregoing citation, this the 3rd day of February, A. D. 1902.

B. H. JONES,
Attorney of Record for the Defendants, William Babcock and Louisa Babcock.

[Endorsed:] Original. In the Supreme Court of the United States. Toltec Ranch Co. plaintiff in error *vs.* William Babcock *et al.*, defendants in error. Citation. Filed Feb. 5, 1902. —— ——, clerk supreme court Utah.

129 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant, *vs.* WILLIAM BABCOCK, Defendant, and LOUISA Babcock, Intervenor, Respondents. } Assignments of Error.

Comes now the plaintiff, Toltec Ranch Company, a corporation, and makes its assignments of error, as follows:

1st. The court erred in affirming the judgment of the trial court.

2nd. The court erred in holding that such title to the land in dispute passed to the Central Pacific Railroad Company of California from the United States of America under the acts of Congress of July 1, 1862, and July 2, 1864, said acts being found and printed in volume 12 of the United States Statutes, pages 289 and following, and volume 13 of the United States Statutes, on page 356 and following respectively; that the said intervenor could and had acquired title thereto against the plaintiff and its predecessors in interest, by adverse possession under the statutes of limitations of the Territory and State of Utah, said statutes of limitations being found and printed in volume 2 of the Compiled Laws of 1888 of the Territory of Utah at page 220 and following, and found and printed in the Revised Statutes of the State of Utah at page 634 and following respectively.

3rd. The court erred in holding and deciding that the said intervenor could and had acquired title to the said lands in dispute by adverse possession under the said statutes of limitations, by an adverse holding of said lands prior to September 5, 1896, the date of the patent to the Central Pacific Railroad Company from the United States.

130 4th. The court erred in holding and deciding that the said intervenor could and had acquired title to the said lands by adverse possession under the said statutes of limitations without proof of the date of the filing of the map of definite location of the line of railroad of said Central Pacific Railroad Company in the office of the Secretary of the Interior.

5th. The court erred in holding and deciding that the said intervenor could and had acquired title by adverse possession of the said lands in dispute, without proof of the date of the survey of the said lands by the United States.

6th. The court erred in holding and deciding that the said intervenor could and had acquired title to the said lands in dispute by adverse possession under the said statute of limitations without proof of the date of selection of the said lands by the said railroad company.

Dated January 31, 1902.

T. D. JOHNSON,
Attorney for the Plaintiff, Toltec Ranch Company, a Corporation.

[Endorsed:] 1327. Assignment of errors. Filed Jan. 31, 1902. ——— ———, clerk supreme court Utah.

131 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
WILLIAM BABCOCK, Defendant, and LOUISA BABCOCK, Intervener, Respondent. } Bond.

Know all men by these presents, that we, The Toltec Ranch Company, a corporation, as principal, and William Keyting and James McTerney, as sureties, are held and firmly bound unto William Babcock, defendant, and Louise Babcock, intervener and respondents, in the full and just sum of five hundred dollars, $500.00, to be paid to said respondents, William Babcock and Louise Babcock, their heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this the 31st day of January, 1902.

Whereas, lately, in the supreme court of the State of Utah, in the suit depending in said court between said plaintiff, The Toltec Ranch Company, a corporation, and the said defendant and intervener, William Babcock and Louise Babcock, a judgment was rendered against the said plaintiff, Toltec Ranch Company, and it, the said plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in
132 the aforesaid suit, and a citation directed to said William Babcock and Louisa Babcock citing and admonishing them

to be and appear at a term of the Supreme Court of the United States holden at the seat of government at Washington, within sixty days of the date of said citation:

Now the condition of the above obligation is such that if the said Toltec Ranch Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make the plea good, then the obligation to be void; else to remain in full force and virtue.

TOLTEC RANCH COMPANY. [SEAL.]
WILLIAM KEYTING. [SEAL.]
JAMES McTERNEY. [SEAL.]

Signed, sealed and delivered in the presence of—
JOSIAH THOMAS.

STATE OF UTAH, }
County of Salt Lake, } ss:

William Keyting and James McTerney, being each severally duly sworn each for himself says: That he is a resident and householder in Salt Lake county, Utah, and is worth the sum of five hundred dollars, the penalty of the foregoing bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

WM. KEYTING.
JAMES McTERNEY.

Subscribed and sworn to before me this 31st day of January, 1902.

[SEAL.] JOSIAH THOMAS,
Notary Public.

Approved by
JAMES A. MINER,
Chief Justice of the Supreme Court of the State of Utah.

133 UNITED STATES OF AMERICA:

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, pursuant to a writ of error allowed in the cause wherein The Toltec Ranch Company, a corporation, is plaintiff in error, and William Babcock and Louise Babcock, intervener, are defendants in error, do herewith return attached hereto a transcript of the proceedings had in said cause, with a copy of the judgment and opinion of said court, and the bond given in pursuance of the allowance of said writ of error, together with the original order granting said writ of error, writ of error, citation, and assignment of errors.

And I further certify that said transcript of the record and pro

ceedings had in said cause, contains full, true and correct copies of the several originals now on file and of record in my office.

Seal Supreme Court, State of Utah, Jan. 4, 1896.

In witness whereof, I hereunto set my hand and affix the seal of said supreme court of the State of Utah, this the 31st day of March, A. D. 1902.

LILBURN P. PALMER, *Clerk.*

Endorsed on cover: File No. 18,516. Utah supreme court. Term No. 317. Toltec Ranch Company, plaintiff in error, *vs.* William Babcock and Louisa Babcock. Filed April 25", 1902.

Supreme Court of the United States

OCTOBER TERM 1902.

No. 342
49

Supreme Court U. S.
FILED
MAY 4 1903
JAMES H. McKENNEY,
Clerk.

TOLTEC RANCH COMPANY, Plaintiff in Error,

vs.

WILLIAM BABCOCK AND LOUISA BABCOCK, Defendants.

BRIEF OF PLAINTIFF IN ERROR.

T. D. JOHNSON,
Attorney for Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1902.

No. 317.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BABCOCK AND LOUISA BABCOCK, DEFENDANTS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal by the plaintiff in error from the decision of the Supreme Court of the State of Utah, affirming the judgment of the District Court of Box Elder County of said State, and from the judgment of said District Court.

The two actions, Nos. 270 and 278, respectively, between the same parties were, at the hearing of the District Court, consolidated and tried together; No. 270 is an action in ejectment brought by the plaintiff against the defendant, William Babcock, for the recovery of the possession of a part of Section 17, Township Eleven (11) North, Range Two (2) West, Salt Lake Meridian, U. S. Survey (Transcript, 1, 20).

No. 278 is an action in claim and delivery for certain crops, consisting of hay and seed grown upon the lands described in No. 270 (trans. 11).

The defendant William Babcock, upon the overruling of his demurrers to the complaint of plaintiff, answers the same, setting up title in his wife, Louisa Babcock (trans. 3, 12), and pleads affirmatively the statute of limitations (trans. 3-4) in bar of plaintiff's actions (trans. 13-14).

Louisa Babcock, by leave of court, is made a party and files an answer to plaintiff's complaint of the same tenor and effect as that of William Babcock, and also cross-complains (trans. 5-7).

The trial of said causes resulted in judgment for the defendants, which, on appeal to the Supreme Court of the State of Utah, was affirmed, and from said judgment and decision this appeal is prosecuted.

The plaintiff at the trial of said actions, to make out its case, introduced in evidence the patent of the United States to the Central Pacific Railroad Company, bearing date September 5, 1896, conveying the lands in controversy, with other lands, and after introducing the articles of incorporation of plaintiff, and a demand for and the value of the personal property sued for, it rested (trans. 17).

The defendants introduced testimony tending to prove an adverse holding of the said lands under the statute of limitations by the defendant Louisa Babcock (trans. 18-28).

Over the objection of plaintiff, the defendants were permitted to introduce in evidence certified copies of letters written by the Commissioner of the General Land Office to the Register and Receiver at Salt Lake City, designating certain lands to be withdrawn under the grants of Congress to said railroad company (trans. 28).

The plaintiff in error makes the contention that there can be no title acquired by the defendant Louisa Babcock by any adverse holding of the lands in dispute prior to the issuance of the patent by the United States to the said railroad company, and has made the following assignments of error herein:

(1). The Court erred in affirming the judgment of the trial Court.

(2). The Court erred in holding that such title to the land in dispute passed to the Central Pacific Railroad Company of California from the United States of America under the Acts of Congress of July 1, 1862, and July 2, 1864, said Acts being found and printed in Volume 12 of the United States Statutes, pages 289 and following, and Volume 13 of the United States Statutes, on page 356 and following, respectively; that the said intervenor could and

had acquired title thereto against the plaintiff and its predecessors in interest by adverse possession under the statutes of limitations of the Territory and State of Utah, said statutes of limitations being found and printed in Volume 2 of the Compiled Laws of 1888 of the Territory of Utah, at page 220 and following, and found and printed in the Revised Statutes of the State of Utah, at page 634 and following, respectively.

(3). The Court erred in holding and deciding that the said intervenor could and had acquired title to the said lands in dispute by adverse possession under the statute of limitations, by an adverse holding of said lands prior to September 5, 1896, the date of the patent to the Central Pacific Railroad Company from the United States.

(4). The Court erred in holding and deciding that the said intervenor could and had acquired title to the said lands by adverse possession under the statute of limitations, without proof of the date of the filing of the map of definite location of the line of railroad of said Central Pacific Railroad Company in the office of the Secretary of the Interior.

(5). The Court erred in holding and deciding that the said intervenor could acquire and had acquired title to the said lands in dispute without proof of the date of the survey of the said lands by the United States.

(6). The Court erred in holding and deciding that the said intervenor could acquire and had acquired title to the said lands in dispute by adverse possession under the said statutes of limitations, without proof of the date of selection of the said lands by the said railroad company (trans. 83-84).

ARGUMENT.

The Supreme Court of the State of Utah, in reaching its conclusion that the bar of the statute of limitations of the State of Utah constituted a defense to the action of plaintiff, rely upon the following cases of this Court:

Deseret Salt Company vs. Tarpey, 142 U. S. 241.

Tarpey vs. Madsen, 178 U. S. 215.

(trans. 78-79).

And under the authority of these cases held that the statute of limitations ran in favor of the defendant, as well before as after the issuance of the patent to the railroad company.

And as shown by the record, unless this were true the defendants must fail.

Under the provisions of the statutes of the Territory and State of Utah, there must be an adverse holding of lands for at least a period of seven years by the defendants, before its provisions can be invoked.

Compiled Laws of Utah, 1888, Vol. 2, Page 220.
Revised Statutes of Utah, 1898, Page 634.

This action was commenced in the year 1899, the patent of the Government was issued to the railroad company September 5, 1896.

It is undoubtedly the law that the statute of limitations has no application and cannot be invoked in favor of a party claiming title thereunder, so long as the *legal title* remains in the Government.

Gibson vs. Chouteau, 13 Wall. 92.
Redfield vs. Parks, 132 U. S. 239.

The contention of the plaintiff in error is that it does not follow, as held by the Supreme Court of the State of Utah, because the railroad company may have acquired the legal title by virtue of the grant of congress, that the statute of limitations runs, or that title may be acquired by adverse possession prior to the issuance of patent, and this contention is made, notwithstanding the decision of this Court in the case of Langdeau vs. Hanes, 21 Wall. 521, because of the exception stated in the opinion in that case.

Certain conditions in the grants of Congress to the Pacific Railroads have since been recognized, and certain exceptions contained in said grants have been given effect by the decisions of this Court, which may be said to limit the broad scope which might be inferred from the language used in the case of Salt Company vs. Tarpey (supra).

Ankeny vs. Clark, 148 U. S. 345.
Barden vs. Northern Pacific R. R. Co., 154 U. S. 288.
Nelson vs. N. P. R'y Co.

(decided by this Court January 26, 1903).

Reverting to the case of Langdeau vs. Hanes (supra), Mr. Justice Field said: "If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

In the case of Ankeny vs. Clark this Court, quoting from Salt Company vs. Tarpey, says:

"In the case of Deseret Salt Company vs. Tarpey the Court, per Mr. Justice Field, regarding the failure or omission to pay the survey charges as operative to 'preserve to the Government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment' and thus to give the Government a lien for said costs."

And adds: "We therefore conclude that Ankeny, the defendant below, if he held only a title derived from the Northern Pacific Company, and if that company had not paid the costs of surveying and had not received a patent, did not hold such a title as it was obligatory on the plaintiff to accept."

In the case of Barden vs. N. P. R. R. Co., (supra), this Court held, in substance, that even after the performance of all the conditions subsequent by the railroad company, as contemplated by the grant, the discovery of mineral *before patent had actually issued, would defeat the railroad company's title.* It therefore follows that until patent actually issues, the railroad companies or their grantees have not such a title as would put the statute of limitations in motion.

In the case at bar, the only evidence in the record showing that the land in dispute was not within any of the exceptions contained in the grant, and the compliance with the conditions precedent to the issuance of the patent, is the patent itself.

As stated in the case of Langdeau vs. Hanes (supra), "a segregation by survey will be required."

Except as recited in the patent, there is no evidence showing the date of the filing of a map of definite location with the Secretary of the Interior, nor when the land was surveyed and ascertained to be an odd-numbered section, as contemplated by the grant, nor when the Government lien was discharged by the selection of same by the railroad company, and the payment of the fees for surveying, selecting and conveying same, nor, except as appears in the patent, no proof to show the railroad had ever been built at all.

The record fails to show when this land was surveyed, when selected by the railroad company, or when the fees were paid. That all these things were done is proved, of course, by the issuance of the patent, but there can be no presumption as to the time, unless it might be said to be upon the date of the patent itself.

If it is true that no presumption will be indulged as to the time of the selection of the lands by the railroad company, or of the date of its survey by the Government, or the time of the payment of the fees required by law, and if these things, or either of them, are required to be done before the statute of limitations would begin to run, it follows that the defendant has not acquired any title by her alleged adverse holding, and the judgment should be reversed.

Respectfully submitted,

T. D. JOHNSON,
Attorney for Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
Of Counsel.

FILE COPY. 568

Supreme Court of the United States

OCTOBER TERM 1902.

No. 49

Office Supreme Court U. S.
FILED
MAY 27 1903
JAMES H. McKENNEY,
Clerk.

TOLTEC RANCH COMPANY, Plaintiff in Error,

vs.

WILLIAM BABCOCK AND LOUISA BABCOCK,
Defendants.

BRIEF OF DEFENDANTS.

B. H. JONES,

Attorney for Defendants

upreme Court of the United S tates

OCTOBER TERM 1903

No. 317.

T OLTEC RANCH COMPANY, Plaintiff in Error.

vs.

ILLIAM BABCOCK AND LOUISA BABCOCK, Defendants.

BRIEF OF DEFENDANTS.

In this case the defendents relied upon the Statute of Limitations of the State of Utah as a complete defense. The defendants established their defense under the Statutes of Limitations and proved that adverse possession for a period exceeding thirty years had operated to transfer the plaintiff in error's title. No federal question is presented by this record and the defendants therefore ask that this case be dismissed.

"It is a mistake to suppose that every suit for real estate, * * * necessarily raises a question of federal cognizance.

"If this were so the title to all the vast domain,

once vested in the United States, could be brought from the State courts to this tribunal."

Carpenter vs. Williams 9 Wal. 785.

No question is raised in this record as to the validity or operative effect of an Act of Congress, the defense was the statute of limitations and the transfer of the title to the defendants.

McStay vs. Friedman 2 Otto 723.

Rowie vs. Casanova 1 Otto 379.

"The construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States."

Elmendorf vs. Taylor et al 10 Wheat 153.

In this case the plaintiff in error admitted that the defendant "and her predecessors in interest, have held and occupied the premises mentioned exclusively for more than thirty years since her entry upon the same in 1867." (Abs. 5.) The recital indeed shows that the Central Pacific Railroad Co. mortgaged this land Oct. 1st 1870.(Abs. 51.) One of the government corners were found in 1870 and it was then determined by the settlers which was railroad lands and which was government lands. (Abs. 23.) Loveland offered to purchase this land in July 1st, 1876, and its boundaries are defined in this offer. (Abs. 58)

The record shows that there was a withdrawel

of all the odd sections between Wyoming and Monument point to take effect May 15, 1862. (Abs. 61.) Such withdrawel is evidence that the definite location had preceded it.

Newhall vs. Sanger 92 U. S 762.

Moffatt vs. United States 112 U. S. 30.

The recitals in the patent showed that the line of the railroad from Ogden to Sacramento had been constructed and fully completed and equipped prior to Nov. 3rd, 1869. (Abs. 53.)

The title to the lands in dispute vested in the C. P Railroad Co. by virtue of the Pacific Railroad grants. That it was a grant in presenti and that the title vested upon that date has been settled by this court. It is no longer an open question.

No one but the Government can raise the lien question.

"That a grant may be made by a law as well as a patent pursuant to a law has been settled by the repeated decisions of this court."

Ryan vs. Carter 3 Otto 78.

Langdeau vs. Hanes 21 Wall. 521

"If the claim be to land with defined boundaries, or CAPABLE OF IDENTIFICATION, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title."

Langdeau vs Hanes 21 Wall. 521.

"When the route of the road was definitely fixed

(Oct. 20th, 1868.) the sections granted became SUSCEPTABLE OF IDENTIFICATION, and the title then attached as of the date of the grant."

Salt Co. vs. Tarpey 142 U. S. 241.

In this case the legal title to the land was granted by act of Congress, the title was as effectively divested as it would be by the issuance of a patent therefor by the executive department and on th 20th day of Oct., 1868, it became subject to the statute of limitations and an adverse possession thereof from Oct. 20th, 1868, to Oct. 20th, 1875, ripened into a legal title in favor of the adverse possessor and an adverse possession from Oct 20th, 1868, to Oct. 20th, 1888, raised a conclusive presumption of a private grant in favor of the defendants. The effect of this adverse possession cannot be defeated by the subsequent issuance of a patent.

Ever since the definite location of this railroad ejectment suits have been brought upon the legal title to the land granted by the Pacific Railroad Acts without regarding the patent.

Coriune Mill Canal & Stock Co. vs. Johnson. 156 U. S. 574

Deseret Salt Co. vs. Tarpey 142 U. S. 241.

Tarpey vs. Madsen 178 U. S. 215.

In the latter case a patent had been issued to the defendant a homestead settler. The flaw in the settlers title as appears from the latter case is the fact that the settlers dated their settlement prior to the

withdrawal of the lands instead of prior to the definite location. So that, as a matter of history, it is safe to say that the only title to all the lands covered by the cities and towns and homestead and pre-emption claims in Utah between Wyoming and Nevada is that which arises by virtue of the statute of limitations.

See also: Forrester vs. Scott 92 Cal. 398.

Jatunn vs. Smith 95 Cal. 154.

S. P. R. R. Co. vs. Whitaker 109 Cal. 268.

This action for the land in dispute was commenced before the issuance of a patent.

It appeared from the verified answer (Abs. 4 & 6) that the property had been held and possessed adversely to such legal title for thirty-two years before the commencement of the action. So under section 2861 Revised Statutes of Utah 1898 the burden of proof was on the plaintiff in error.

Tyler on Ejectment 867.

Green vs. Hawkins 19 How. 69.

There is not a scintilla of evidence in this case showing an ouster, or an entry, or seizin or possession in plaintiff or its grantors since Oct. 20th, 1868, as required by section 2859 Revised Statutes of Utah of 1898.

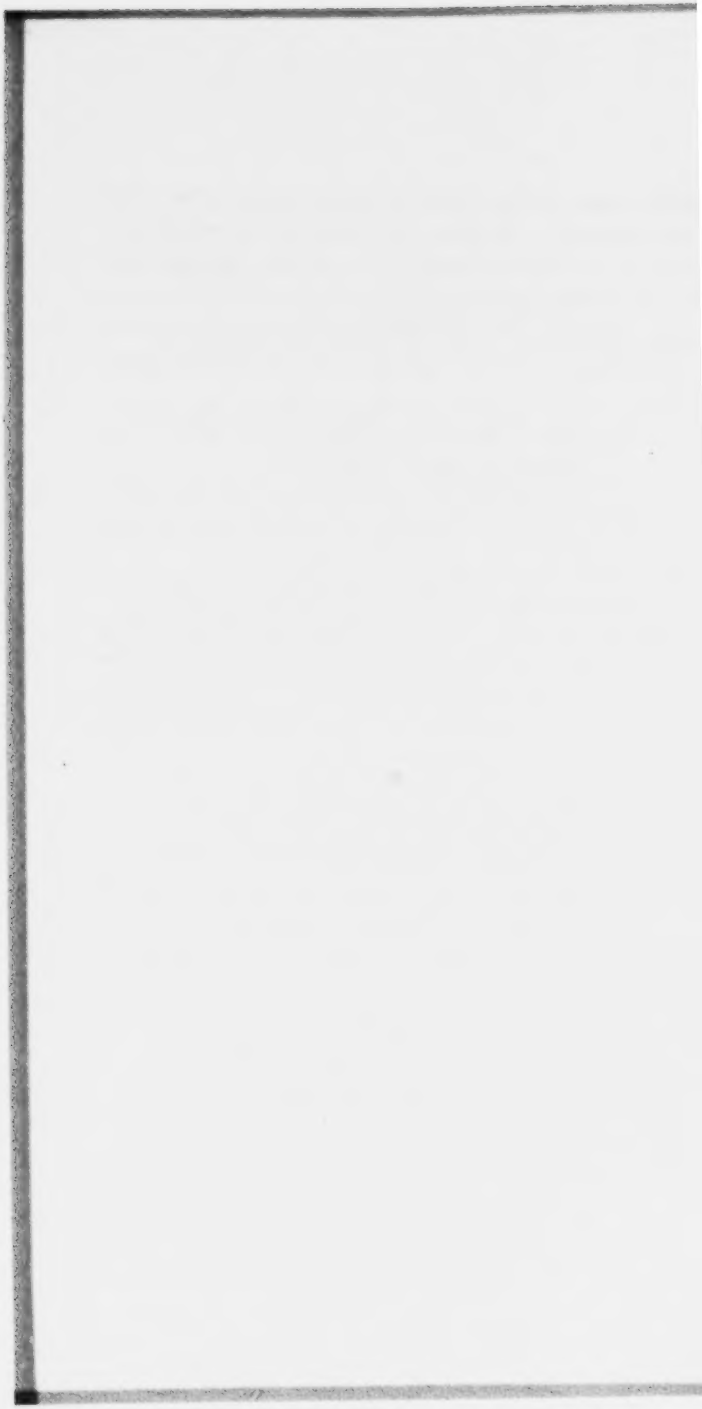
U. S. vs. Chaves 159 U. S. 452.

U. S vs. Devereaux 90 Fed. Rep. 182.

Respectfully submitted;

B. H. JONES,

Attorney for the Defendants.



Supreme Court of the United States.

No. 49.—October Term, 1903.

Toltec Ranch Company, Plaintiff in Error, vs. William Babcock and Louisa Babcock. } In error to the Supreme Court of the State of Utah.

[December 21, 1903.]

Mr. Justice McKenna delivered the opinion of the Court.

Plaintiff in error is a corporation, and brought this action in 1899 in the District Court of the First Judicial District of the State of Utah, county of Box Elder, for the recovery of the possession of sixty-four acres of land in section 17, township 11, north of range 2 west. The plaintiff alleged title in fee. The answer alleged that defendant, William Babcock, held the land as agent of his wife Louisa Babcock, who settled upon it as a homesteader, having the qualifications thereof, in 1867, erected improvements of the value of $1,500, and that the land was reserved from the grant of the Central Pacific Railroad Company. The answer also alleged continuous adverse possession for thirty years under the statutes of Utah. The replication admitted Louisa Babcock had been in exclusive possession for thirty years, neither admitted nor denied that the land was within the grant to the railroad company, denied the value of the improvements, and denied also that the action was barred by the sections of the statute of limitations cited by the defendant's answer.

Louisa Babcock intervened. She denied the allegations of the plaintiff, set up her settlement as a homesteader and the rights acquired by exclusive and adverse possession under sections 2858 to 2872, inclusive, of the Revised Statutes of Utah. She also alleged that "on the 5th day of September, 1896, under a mistake and entirely without authority of law, a patent of the United States was issued purporting to convey to the Central Pacific Railroad Company, under the acts of Congress granting lands to the Pacific railroads, the lands in controversy." And she prayed that "said patent be annulled and set aside, and for such other and further relief as may be just."

The plaintiff, answering the complaint in intervention, admitted the issuance of the patent, but denied all other allegations.

There was also an action brought by the Toltec Company against Babcock for hay and alfalfa seed alleged to have been grown upon the land. The answer raised the issues presented in the ejectment case.

The plaintiff depended for title upon a patent issued to the Central Pacific Railroad Company the 5th of September, 1896, in pursuance of the acts of Congress of July 1, 1862, and July 2, 1864, (12 Stat. 489; 13 Stat. 356,) and a conveyance from the company to it by deed dated November 4, 1897. Against this title adverse possession was claimed as we have seen.

The cases were tried together and to a jury, which found "the issues in favor of the defendants and against the plaintiff, 'no cause of action.'" Judgment was entered for defendants. It was affirmed by the Supreme Court of the State on appeal. (66 Pac. Rep. 876.)

The court concluded its opinion as follows: "From the foregoing considerations, and from a careful examination of the proof, we are of the opinion that the intervenor is entitled to hold the land in controversy, and the crops raised thereon, by adverse possession, and that, as against the plaintiff, she has the absolute title thereto. We see nothing in the record which justifies a reversal. The judgment is affirmed, with costs."

This writ of error was allowed by the Chief Justice of Utah. It presents the same questions which have been decided in *Toltec Ranch Company* v. *Cook et al.* On the authority of that case, therefore, the

Judgment is affirmed.

Mr. Justice BREWER concurs in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.